SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 469

INCRES STEAMSHIP COMPANY, LTD.,
PETITIONER,

vs.

INTERNATIONAL MARITIME WORKERS
UNION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

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[fol. 3]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7187-1960

INCRES STEAMSHIP COMPANY, LTD., Plaintiff,

—against—

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants.

NOTICE OF APPEAL TO THE APPELLATE DIVISION—June 8, 1960

Sirs:

Please Take Notice that defendants hereby appeal to the Appellate Division of the Supreme Court, First Judicial Department, from an order and judgment entered in the above-entitled action in the Office of the Clerk of the County of New York on the 7th day of June, 1960 denying defendants' motion under Rules 106(1) and 107(1) of the Rules of Civil Practice for an order dismissing the complaint on the ground that the Court has not jurisdiction of the subject of the action, and granting to plaintiff a permanent [fol. 4] injunction, and defendants appeal from each and every part of said order and judgment.

Dated: New York, N. Y.
June 8, 1960.

Yours, etc.

Cooper, Ostrin & De Varco, Office & P. O. Address: 655 Madison Avenue, New York 21, N. Y.

Miller and Seeger, Office & P. O. Address: 400 Madison Avenue, New York 17, N. Y.

Attorneys for Defendants.

To:

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Plaintiff, 2 Wall Street, New York 5, N. Y.

Clerk of the County of New York.

[fol. 5]

At a Special Term Part I of the Supreme Court, held in and for the County of New York at the County Court House thereof in the City of New York, County of New York, State of New York, on the 7 day of June, 1960.

Present: Hon. Henry Clay Greenberg, Justice.

Index No. 7187-1960

INCRES STEAMSHIP COMPANY, LTD., Plaintiff,

—against—

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants.

ORDER AND JUDGMENT APPEALED FROM—June 7, 1960

An order to show cause having been granted herein by Hon. Henry Clay Greenberg, a Justice of this Court, requiring the defendants to show cause why a preliminary injunction should not issue enjoining the defendants, their members, agents, servants and those acting in concert or cooperating with them during the pendency of this action from interfering in any way with the operation and management of the SS. *Nassau* and the MV. *Victoria*, from inciting, urging or encouraging crew members to neglect their [fol. 6] duties on board said vessels, also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon, also from picketing said vessels for any purpose; and said motion coming regularly on to be heard on May 18, 1960; and the parties to this action by their attorneys in open court having stipulated that said motion for a preliminary injunction also be treated by this Court as an application for a permanent injunction;

Now, upon the complaint, the affidavit of Max J. Ramsden Wolfson, sworn to the 14th day of May, 1960 and of Paolo Vagliasindi, sworn to the 14th day of May, 1960, filed in support of the order to show cause herein and upon the affidavit of Shannon J. Wall, sworn to the 17th day of May, 1960 and filed in support of the notice of motion of defendants dated May 17, 1960 to dismiss the complaint herein and the issues having been tried before the court, without a jury, on said 18th day of May, 1960, the 19th day of May, 1960, the 20th day of May, 1960, and the 23rd day of May, 1960, and the plaintiff appearing by Donovan Leisure Newton & Irvine, Esqs. and defendants International Maritime Works Union and Shannon J. Wall appearing by Cooper, Ostrin & De Varco, Esqs. and Miller & Seeger, Esqs., and the parties having presented their proofs, and at the close of all the proofs the plaintiff having moved for judgment, as prayed for in the complaint herein, and defendants having moved for a judgment dismissing the complaint, and the Court after due deliberation having directed judgment in favor of the plaintiff against the defendants and denying defendants' motion to [fol. 7] dismiss the complaint, and the decision of the Court having been duly filed herein;

Now, on motion of Donovan Leisure Newton & Irvine, attorneys for the plaintiff, it is

Ordered, Adjudged and Decreed that the Court has jurisdiction of the cause and to grant the injunctive relief as prayed for in the complaint herein and the said motion of defendants to dismiss the complaint be and the same hereby is denied;

And it is Further Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendants permanently restraining and enjoining the defendants, their successors, their members, agents, and servants and those persons in active concert or participation with defendants who receive actual notice of this judgment by personal service or otherwise and each and every one of them from, on and after the 10th day of June, 1960, interfering in any way with the operation and management of the SS.

Nassau and the MV. *Victoria*, from inciting, urging or encouraging crew members to neglect their duties on board said vessels, also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon and also from picketing said vessels for any purpose.

And it is Further Ordered, Adjudged and Decreed that the jurisdiction of the Court over the claim of plaintiff for damages and for such further and other relief requested in the complaint herein as may be just and proper be reserved [fol. 8] for trial in regular course, and to that extent the claim is severed.

Enter

H. C. G., J.S.C.

(Seal)

James McGurren, Clerk.

IN SUPREME COURT OF THE STATE OF NEW YORK

ORDER TO SHOW CAUSE WITH INTERIM RESTRAINING ORDER

Upon the verified complaint herein, the affidavit of Max J. Ramsden Wolfson, sworn to on the 14th day of May, 1960, and the affidavit of Paolo Vagliasindi, sworn to on the 14th day of May, 1960, let the defendants or their attorneys show cause at a Special Term of this Court, to be held in and for the County of New York, on the 18th day of May, 1960, at 10:00 o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made herein restraining the defendants International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, their members, agents, attorneys and servants and those acting in concert or cooperating with them during the pendency of this action from interfering in any way with the operation and management of the SS. *Nassau* and the MS. *Victoria;* from inciting, urging or encouraging crew members to neglect their duties on board said vessels; also from maintaining, supporting, directing or otherwise

[fol. 9] aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon; also from picketing said vessels for any purpose.

And in the meantime and until the entry and service of the further order of this Court to be made upon the return of this order to show cause, it is further ordered that the said defendants International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, their members, agents, attorneys and servants and those acting in concert or cooperating with them, and each and every one of them be, and they hereby are, jointly and severally, restrained from interfering in any way with the operation and management of the SS. *Nassau* and the MS. *Victoria;* from inciting, urging or encouraging crew members to neglect their duties on board said vessels; also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon; also from picketing said vessels for any purpose.

And it appearing to my satisfaction that a proper case is presented for the issuance of an Order to Show Cause in the place and stead of the usual five days' notice of motion, I do hereby order and direct that service of this Order to Show Cause and of the papers upon which the same has been granted upon the defendants on or before Noon of the 17th day of May, 1960, shall be held sufficient notice of motion herein and of the application for an injunction *pendente lite* herein.

Henry Clay Greenberg, J.S.C.

[fol. 10]

IN SUPREME COURT OF THE STATE OF NEW YORK

COMPLAINT, READ IN SUPPORT OF MOTION

Plaintiff complaining of the defendants herein alleges:

1. At all times herein mentioned plaintiff, Ineres Steamship Company, Ltd., (hereinafter called "Ineres"), was and still is a corporation duly organized and existing under the

laws of the Republic of Liberia and has its principal office in Monrovia, Liberia.

2. Upon information and belief, at all times herein mentioned the defendant International Maritime Workers Union (hereinafter called "IMWU") is an unincorporated association, the membership of which includes both United States citizens and citizens of foreign nations, with its office and place of business at 265 West 14th Street, New York 11, New York.

3. Upon information and belief, the defendant Shannon J. Wall is the President of IMWU and a resident of the State of New Jersey; the defendant Edward Pogor is a representative of IMWU whose residence is unknown; and the defendants John Doe and Richard Roe are fictional persons representing herein officers, representatives and members of IMWU. The above-named individual defendants at all times herein mentioned dominated, directed and controlled, and still dominate, direct and control the activities of IMWU.

4. Upon information and belief, at all times hereinafter mentioned Federazione Italiana Lavoratori Del Mare [fol. 11] (hereinafter referred to as "Federazione"), was and still is a maritime labor organization existing under the laws of the Republic of Italy for the purpose of representing Italian seamen with respect to wages, terms and conditions of employment, and the aid and protection of its members.

5. At all times hereinafter mentioned plaintiff was and is the owner of the SS. *Nassau* and MS. *Victoria*, both ocean-going passenger cruise vessels operating on scheduled routes. The SS. *Nassau* operates on a weekly schedule and engages primarily in the transportation of passengers for hire between the ports of New York, New York and Nassau, British West Indies. The MS. *Victoria* engages primarily in the transportation of passengers for hire between the ports of New York, New York, and foreign ports in the Caribbean area.

6. At all times hereinafter mentioned both the SS. *Nassau* and MS. *Victoria* were and are duly registered

under the laws of the Republic of Liberia and fly the Liberian flag.

7. Upon information and belief, on or about May 13, 1960 the SS. *Nassau* lawfully entered the Port of New York and docked at Pier 42, North River, New York City, where it presently remains. The MS. *Victoria* is scheduled to arrive at the Port of New York and dock at Pier 42, North River, New York City, on or about May 15, 1960.

8. Upon information and belief, on or about May 13, 1960 when the SS. *Nassau* entered the Port of New York, [fol. 12] plaintiff employed more than 230 crew members on board the vessel. At all times hereinafter mentioned, all of the crew members were and are Italian citizens with the exception of the Cruise Director and Staff Captain who were and are United States citizens, a Steward who was and is a Spanish citizen, a Nurse who was and is a Swiss citizen, and a Laundryman who was and is a Chinese citizen.

9. Upon information and belief, at all times hereinafter mentioned each of the crew members on board the SS. *Nassau* was and is serving under Liberian Articles of Agreement opened and executed in Genoa, Italy, on or about November 27, 1959 and which at all times since and now are in full force and effect and will be in full force and effect for a period not exceeding one year from said 27th day of November, 1959 or until the termination of the 1960 cruise period for the SS. *Nassau* which will terminate during the month of September, 1960. The Articles of Agreement deal with the employment of the crew members of the vessel and their wages, working conditions, food and other aspects of their employment.

10. Upon information and belief, at all times hereinafter mentioned a large proportion of the crew members who were and are employed on board the SS. *Nassau* were and are members of the Italian union, Federazione, and the employment contracts entered into by said crew members correspond to the Italian National Contract approved by Federazione and that said crew members enjoy pension and illness benefits similar to those enjoyed by other Italian seamen.

11. Upon information and belief, on May 13, 1960 early in the morning representatives of IMWU, with full knowl-[fol. 13] edge of the existing Articles of Agreement in effect on board the vessel, stood on the dock alongside the SS. *Nassau* and called to the men to stop their work and prepare to strike the vessel. As a consequence of this intended inducement by the representatives of IMWU the ship's stewards refused to work and neglected their duties on board the vessel.

12. Upon information and belief, on May 13, 1960 at approximately 10:30 A. M. longshoremen ceased to load baggage, cargo and provisions on board the SS. *Nassau* because of a picket line set up by IMWU at the entrance to Pier 42, North River, New York City. Persons in the picket line carried signs demanding that plaintiff recognize IMWU as the vessel's bargaining agent.

13. Upon information and belief, on May 13, 1960 at approximately 5:00 P. M. representatives of IMWU, having full knowledge of the contractual relations between plaintiff and the crew members, boarded the SS. *Nassau* without permission and incited, encouraged and urged crew members to quit work and desert the vessel. More than 200 crew members thereupon walked off the vessel, some in the hope of higher wages promised by IMWU and others in fear of reprisal. As a result the SS. *Nassau* was left with approximately 10 seamen on board and without the large number of personnel necessary to service or safeguard approximately 360 passengers who had boarded the vessel which originally was scheduled to depart at 6:00 P. M. on May 13, 1960.

14. Upon information and belief, on May 13, 1960 at approximately 5:15 P. M. Paolo Vagliasindi, the Captain [fol. 14] of the SS. *Nassau*, called together on the dock the deserting crew members who had left the ship and urged them to return to the vessel and resume their duties. At the instigation of IMWU representatives, the crew members refused this request.

15. Upon information and belief, because of the activities of representatives of IMWU, committed by all IMWU

members through their association, the SS. *Nassau* has been kept incapacitated and cut off from services at Pier 42, North River, New York City, since May 13, 1960 at approximately 5:15 P. M. The vessel presently is without the complement of crew members necessary to move the vessel safely from its berth, and because of the picket line cannot obtain necessary towing services from tugboats. The SS. *Nassau* presently is occupying the berth reserved for the MS. *Victoria* which is scheduled to arrive in the Port of New York on May 15, 1960. Unless the SS. *Nassau* is moved from Pier 42, the MS. *Victoria* will not have a berth to discharge passengers and cargoes. The IMWU has demanded that it also be recognized as the bargaining agent for the MS. *Victoria*, and thus has made it clear that this vessel will also be subject to IMWU pressures upon its arrival.

16. The activities of the defendant union and its officers and members constitute an unlawful intentional interference with plaintiff's business and an intentional infliction of temporal damage in that defendant seeks by picketing and otherwise to compel recognition of defendant union notwithstanding that said union does not lawfully represent [fol. 15] a majority of the crew, and the plaintiff is the innocent victim of a jurisdictional dispute between rival unions.

17. The activities of the defendant union and its officers and members constitute an unlawful interference with the plaintiff's business and an intentional infliction of temporal damage in that defendant seeks by picketing and otherwise to coerce plaintiff to recognize defendant union although such union could not be certified as collective bargaining agent by either the National Labor Relations Board or the New York State Labor Relations Board for the reason that neither the state nor the federal labor relations statutes apply to foreign ships with foreign crews in any way.

18. The activities of the defendant union and its officers and members constitute an unlawful intentional interference with the internal management and relations of a foreign vessel and an intentional infliction of temporal dam-

age in that defendant has induced and coerced breaches of the ship's articles, neglect of duty and desertion.

19. The activities of defendant union and its officers and members are for an unlawful purpose in that they constitute an intentional infliction of temporal damage and a breach of the provisions of Treaty of Friendship, commerce and navigation dated August 8, 1938 between the United States and the Republic of Liberia, which provides for freedom of commerce and navigation, the right of Liberian vessels freely to enter United States ports, and the right of Liberian nationals to engage in commercial [fol. 16] activity in the United States without interference.

20. No labor dispute exists between plaintiff and defendants as defined by Section 876-a of the Civil Practice Act.

21. As a consequence of defendants' acts plaintiff has suffered very severe monetary loss.

22. The plaintiff has spent large sums of money in purchasing, converting, repairing and maintaining the SS. *Nassau* and MS. *Victoria*, and in establishing and maintaining an organization to solicit passengers and carry out necessary business functions. In operating these vessels the plaintiff has established valuable good will and reputation, and its business has been well-patronized and profitable. Many passengers have purchased tickets for future cruises on plaintiff's vessels. The activities of IMWU threaten to destroy plaintiff's business and good will, to necessitate a refund of passage monies paid in advance, to bring about the cancellation of future voyages and to subject plaintiff to publicity which is unjust and unwarranted, all to plaintiff's irreparable damage.

23. Defendants' activities directed against plaintiff's vessels will continue unless restrained.

24. Plaintiff has no adequate remedy at law.

25. The granting of a temporary restraining order and a preliminary injunction will not work hardship on defendants because plaintiff's vessels regularly and at short

[fol. 17] intervals come into New York and are always subject to the power of the defendant union to picket the ships and apply other economic pressures, whereas on the other hand plaintiff is being subjected to extremely severe economic loss and the threatened destruction of its good will, reputation, and opportunity to carry on in business at all.

Wherefore, the plaintiff prays that:

1. This court make an order directing the defendants and if and then to show cause at a time and place to be appointed and an order to have causes why they and each of them and their agents and those acting in cooperation with them should not be restrained during the pendency of this action from interfering in any way with the operation and management of the SS. *Nassau* and MS. *Victoria*; from inciting, urging, or encouraging crew members thereof to neglect their duties on board said vessels, or to refuse to return to said vessel; also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon; also from picketing said vessels for any purpose.

2. A temporary restraining order be granted enjoining and restraining the above-named defendants and their agents and those acting in concert with them and each of them until time whereupon the order to include from doing or threatening to do any of the acts and things set forth above in Paragraph 1 in this prayer for relief.

[fol. 18] 3. That upon the hearing of said order to show cause a preliminary injunction be granted restraining said defendants and each of them, and respective members, agents, servants, representatives and employees from doing any of said acts and things set forth above in Paragraph 1 of this prayer for relief.

4. That the said restraining order and said injunction be in force and binding upon all of the defendants above named and upon each and all other persons whomsoever are not named herein where such person has knowledge of said restraining order or when such injunction or restraining

order and the existence and of be made known to any of such persons by personal service upon them or any of them of a copy of such order.

5. That plaintiff be allowed to recover from defendants damages and costs of suit herein incurred and such other and further relief, if any, as may be just and proper.

Gray & Wythe, Horace M. Gray, Attorneys for Plaintiff.
(Verified by Max J. Ramsden Wolfson, Agent for Plaintiff Incres Steamship Company, Ltd., May , 1960.)

[fol. 19]

IN SUPREME COURT OF THE STATE OF NEW YORK

AFFIDAVIT OF MAX J. RAMSDEN WOLFSON, READ IN SUPPORT OF MOTION—May 14, 1960

State of New York,
County of New York, ss.:

Max J. Ramsden Wolfson, being duly sworn, deposes and says:

That he is President of Incres Line Agency, Inc., a New York corporation having offices at 39 Broadway, New York, N. Y., and is familiar with the facts hereinafter set forth in this affidavit submitted in support of a motion for a temporary restraining order and preliminary injunction.

This affidavit is submitted by deponent as an officer of Incres Line Agency, Inc., the General Passenger Agent in North America of the plaintiff, inasmuch as the plaintiff is a Liberian corporation with no office or place of business within the United States, and inasmuch as there is at this time no officer of the plaintiff within the United States. Mr. Vincenzo Berlingeri, the President of the plaintiff Incres Steamship Company, Ltd. (hereinafter called "Incres") will arrive in New York on May 15th, however.

Incres is a corporation duly organized and existing under the laws of the Republic of Liberia, with its principal office in Monrovia, Liberia. The Company is in the business of operating passenger vessels between New York and

Caribbean ports. It is the owner of the Steamship *Nassau* and the Motor Vessel *Victoria*, each of which vessels is lawfully registered under the laws of Liberia and flies the Liberian Flag.

[fol. 20] Upon information and belief the defendant union is an unincorporated association having its principal office and place of business at 263 West 14th Street, New York, N. Y.; the defendants Shannon J. Wall and Edward Pogor are respectively president and a representative of defendant union and as such have dominated, directed and controlled and still dominate, direct and control the affairs and activities of defendant union.

The SS. *Nassau* and the MS. *Victoria* are vessels each with accommodations for in excess of 500 passengers. Both vessels are making regular runs between New York and Caribbean ports. The SS. *Nassau* was due to depart New York for Nassau at 6:00 o'clock May 13th and return May 20th. The MS. *Victoria* is due to arrive in New York on May 15th.

Both vessels are operated by crews substantially all of whom are Italian citizens. The crews were lawfully signed on in Genoa, Italy, in the Fall of 1959 under Liberian Articles of Agreement which are presently in effect and which remain in effect for one year or until the expiration of the cruise season of the vessels, which usually occurs during the month of September.

Upon information and belief, this contract was approved by the Federazione Italiana Lavoratori del Mare which is an Italian union, and at the time of the signing of the Articles and at all times since a large proportion of the crews have been members of that union. The terms of the Articles of Agreement correspond to those of the Italian National Contract and were approved by the Federazione Italiana Lavoratori del Mare.

[fol. 21] Upon information and belief, the crews are regularly covered as to a pension fund with the Cassa Previdenza Marinara and as to sickness benefits with the Cassa Marittima Tirrena.

In the Articles of Agreement under the National Contract all wages, hours, terms and conditions of employment relating to ships' personnel are settled, determined, and

agreed upon so that at the present time no labor dispute or dispute of any nature exists with respect thereto.

On the morning of May 13th the defendant union began maliciously, recklessly and unlawfully interfering with the operation and loading of the SS *Nassau* and has prevented the vessel from leaving her berth at Pier 42, in causing said vessel to be picketed by members of the defendant union and in boarding said vessel and inciting and causing mutiny, desertion, and breach of their Articles by the crew.

Their activities furthermore gravely endangered and endanger the safety of the 357 passengers on board the ship and resulted in the ship being stripped of the majority of its crew except for a skeleton watch. It resulted in there being no stewards on board to provide dinner for the passengers, to direct them about the ship, or to otherwise look out for and safeguard them. These obstructive and malicious activities have been continued with the result that the ship is unable to obtain services of any sort because union labor has refused to cross the picket lines. Furthermore, many of the passengers have at this time canceled their reservations and Incres has been obliged to refund [fol. 22] in excess of $80,000 fares. Other damages increase with each hour that the ship is tied up.

The reputation and good will of the SS *Nassau* and the Incres have been and are being irreparably harmed. This reputation and good will constitute invaluable assets in the cruise business in which the Company is engaged.

The picketing and other activity was commenced utterly without warning, although plaintiff allowed representatives on board to converse with the crew and at all times indicated its willingness to meet with and did meet with defendant union and its representatives. Defendants have been and are carrying placards bearing the legend in effect: "SS *Nassau* unfair; will not recognize International Maritime Workers Union" and similar language.

An offer was delivered by defendant union to the SS *Nassau* in the evening of May 13th stating that defendant union would withdraw its picket line if Incres agreed to meet with it on May 16th for the purpose of collective bargaining. Mr. Berlingeri was contacted by radio and au-

thorized agreement to this offer provided negotiations would not be in conflict with the decisions which are to be taken at the next meeting in London of International Trade Federation, a federation of unions of many nations, regarding jurisdiction over the personnel of the two vessels above named. This offer was rejected by the union, although it was eminently fair in view of the international jurisdictional questions involved between the rival American and Italian unions and the impossibility of determining which union if any should rightfully represent the crews [fol. 23] of the SS *Nassau* and the MS *Victoria*.

The activities of the union lead to the inescapable conclusion that the MS *Victoria* will be picketed upon her arrival on May 15th in that the defendant union has demanded recognition as the bargaining agent of that vessel as well as the *Nassau*. The ship is due to dock at Pier 42, which is currently blocked by the presence of the SS *Nassau*. The SS *Nassau* cannot be moved, due to the picket lines, and it is believed that the MS *Victoria* will be unable to dock at another pier due to the understandable reluctance of pier owners to let ships which are certain to be picketed tie up at their piers. It is not known how or if passengers on the MS *Victoria* will be able to be disembarked.

Wherefore, deponent prays that this Court will issue a temporary restraining order and a preliminary injunction against defendants and those cooperating with them, commanding them to remove all pickets immediately and to refrain and desist from picketing the MS *Victoria* on her arrival in New York and to cease obstructing or coercing Incres, and for such other relief as may be just. No previous application for the relief requested herein has been made.

Max Ramsden Wolfson.

(Sworn to before Cord W. Eriksen, May 14, 1960.)

[fol. 24]

IN SUPREME COURT OF THE STATE OF NEW YORK

AFFIDAVIT OF PAOLO VAGLIASINDI, READ IN SUPPORT OF MOTION—May 14, 1960

State of New York,
County of New York, ss.:

Paolo Vagliasindi, being duly sworn, deposes and says:

That I am an Italian citizen and Captain of the SS *Nassau*, a passenger cruise vessel registered under the laws of the Republic of Liberia and flying the Liberian Flag.

The SS. *Nassau* is owned by Incres Steamship Company, Ltd. (hereinafter called "Incres"), a corporation organized and existing under the laws of Liberia.

Substantially all of the crew of the SS. *Nassau* are Italian citizens. The crew entered into Liberian Articles of Agreement in Genoa on or about November 27, 1959. These Articles remain in effect for one year or till the end of the ship's cruise season which ordinarily is in the fall.

The SS. *Nassau* is engaged in weekly cruises between New York, N. Y. and Nassau, B. W. I. The ship reached New York on the morning of May 13 and tied up at Pier 42, North River.

On information and belief union men were on the dock when the ship arrived. Early in the morning one of the officers was told that a whispered call from the dock was directed toward the ship and urging the crew not to perform any work as the ship would not sail because it would be picketed. The first sign of a disobeyal of orders occurred in the morning when some of the ship's stewards refused to perform their duties. This was to spread during the [fol. 25] day until the ship became totally incapacitated and cut off from services.

At approximately 10:30 A. M. longshoremen ceased loading provisions and other items onto the ship after having loaded about two out of seventy tons. On information and belief this work stoppage was caused by the placing of a

picket fine by the defendant union at the entrance of the Pier.

The crew of the ship was therefore ordered to embark the goods which were left lying on the pier in the open. About 6 stewards disobeyed orders and refused to embark the provisions and other items, but the remainder of the crew did complete the loading, although numerous members of the union were visible in the dock area.

After twelve a large number of the crew went ashore on leave until four o'clock at which time all members returned and started to work in the usual way. On information and belief these crew men were incited, induced and improperly persuaded while on shore to disobey orders and cease performing their work at five o'clock by the defendants. At or about five o'clock all of the crew except for the watch and about fifty men ceased working and abandoned the ship.

I then went ashore as Captain and urged the men to come back on board and resume their duties, but the crew refused. Union representatives and members were waiting at the end of the dock. At about 2:30 P. M. members of the ship's crew engaged in painting areas of the ship and had been subjected to threats of violation and intimidation, and in view of the explosive atmosphere which prevailed [fol. 26] at that time and to avoid violence and disturbance I ordered those men to cease painting.

Shortly after five o'clock union representatives boarded the ship and induced by various means, including coercion and threats, most of the fifty or so crew members remaining on board to abandon the ship.

The ship thereafter remained crewless except for a watch. The last of the 357 passengers had boarded, but there were no stewards to prepare dinner for them or provide other vital services. The ship was left and is left without the necessary personnel on board to insure her safety or the safety of the passengers had an emergency arisen or should one arise. Only a small watch and the officers and certain supervisory personnel have remained on board, effectively subject to orders.

The MS. *Victoria* is due to arrive at Pier 42 on May 15th but there is no room for her because the SS. *Nassau* can-

not be moved as a result of the picket lines and the lack of an effective crew.

Capt. Vagliasindi.

(Sworn to before Cord W. Eriksen, May 14, 1960.)

[fol. 27]

IN SUPREME COURT OF THE STATE OF NEW YORK

NOTICE OF CROSS MOTION—May 17, 1960

Sirs:

Please Take Notice that annexed hereto is the affidavit of Shannon J. Wall, sworn to the 17th day of May, 1960, in opposition to plaintiff's motion for a temporary injunction.

Please Take Further Notice that at the time of the hearing of plaintiff's said motion defendants will make a cross motion

(1) Upon the complaint pursuant to Rule 106(1), and

(2) Upon the complaint and the said annexed affidavit of Shannon J. Wall pursuant to Rule 107(1).

for an Order dismissing the complaint upon the ground that the Court has not jurisdiction of the subject of the action and for such other further and different relief as to the Court may seem just and proper.

Dated: New York, New York, May 17, 1960.

Yours, etc.

Cooper, Ostrin & De Varco, Attorneys for Defendants.

To: Gray & Wythe, Esqs., 42 Broadway, New York, New York.

[fol. 28]

IN SUPREME COURT OF THE STATE OF NEW YORK

AFFIDAVIT OF SHANNON J. WALL, READ IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Shannon J. Wall, being duly sworn, makes the following statement:

I am the Executive Director of International Maritime Workers Union (IMWU) which maintains its offices at 265 West 14th Street, New York 11, New York, and I am fully familiar with all of the facts hereinafter set forth.

I submit this affidavit in opposition to plaintiff's motion for a temporary injunction and in support of defendants' cross-motion under Rule 107 to dismiss the complaint on the ground that the Court lacks jurisdiction of the subject of the action in that the labor dispute here presented has been preempted by Congress in the National Labor Relations Act.

With regard to serious jurisdictional questions which have been raised, the Court should be informed that IMWU has filed unfair labor practice charges against plaintiff with the National Labor Relations Board. A copy of the formal charges is annexed hereto as Exhibit "A".

This case arises out of a labor dispute between plaintiff Incres Steamship Co. and the crews of the Company's two vessels SS. *Nassau* and M/V. *Victoria*. A majority of these crew members have chosen IMWU as their collective bargaining representative and want recognition for the Union. Specific grievances of the crews that had led to this dis-
[fol. 29] pute include low pay, inferior working conditions, a bonus system of overtime, kickbacks and lack of job security resulting from no union representation.

Thus the Court has before it a typical labor dispute between an employer and his employees. The peaceful picketing engaged in by IMWU in support of the employees' demands has traditionally been held lawful by state and federal courts.

The IMWU was formed for the purpose of organizing merchant seamen employed aboard vessels whose flags are foreign to the United States but which are ultimately owned or controlled by United States or related interests having no substantial connection with the flag of registry. Shipowners, hopeful of evading corporation income taxes, union labor standards and strict safety and maintenance requirements, commonly register their vessels under the flags of Panama, Liberia or Honduras.

To meet the threat of "Panlibhon" registry, trade unions of some sixty-two nations in the free world have, through their parent association, International Transportation Workers Federation (ITF), worked out an agreement among themselves that jurisdiction to organize the crew of a particular vessel shall lie with the union in the country where the actual control of the vessel is maintained, regardless of the flag the vessel may fly. The jurisdiction of IMWU to organize the crews of plaintiff's vessels has been expressly confirmed by ITF (Exhibit "B").

Plaintiff appears most intent in its moving papers to convince the Court that it is a "Liberian corporation with [fol. 30] no office or place of business within the United States. . . ." The fact is that the registration of plaintiff's vessels under Liberian Flag is a purely technical device. Neither the *Nassau* nor the *Victoria* have ever touched a Liberian port, nor is plaintiff controlled in any manner by Liberian interests. On the contrary, plaintiff is engaged in an American shipping enterprise, operating exclusively out of the Port of New York and managed and controlled from New York City.

Plaintiff is engaged in the Caribbean cruise business. The *Nassau* and *Victoria* sail regularly from New York to Caribbean ports and this is the extent of their commercial operations, or at least the moving papers disclose no other. Plaintiff's passengers are almost exclusively American tourists. How plaintiff is able to conduct its large cruise business without an "office or place of business within the United States" is easily discernible from its moving papers. It does so through a second corporation, Ineres Line Agency, Inc., whose President, Max J. Wolfson, has filed

the main affidavit in support of plaintiff's application for a temporary injunction.

Ineres Line Agency, which is admittedly a New York corporation with offices at 39 Broadway, represents itself to be plaintiff's "General Passenger Agent in North America." The nature of the interlocking interests between the so-called Liberian corporation, Ineres Steamship Company, Ltd., and the New York corporation, Ineres Line Agency, Inc., may be left to inference.

Clearly, however, someone in New York is selling tickets for plaintiff's cruises and seeing to it that the *Victoria* and [fol. 31] *Nassau* are supplied and maintained. Parenthetically, it might be observed that Captain Paolo Vagliasindi, Master of the *Nassau*, asserts in his affidavit that because of defendants' picketing plaintiff has been unable to load in New York City nearly seventy tons of provisions aboard the *Nassau*.

Plainly, therefore, plaintiff notwithstanding its Liberian registry is engaged in United States shipping operations conducting Caribbean cruises for American citizens. Plaintiff's connection with Liberia is fictional—a corporate smoke screen through which plaintiff hopes to escape exposure to United States labor laws and the organizational activities of legitimate maritime unions.

Plaintiff's anti-union motivations are doomed to frustration. For, as we show in our memorandum of law, The National Labor Relations Board and the Supreme Court of the United States have both upheld the legitimacy of organizational activities by American maritime unions against Panlibhon ship operations such as plaintiff. Against the factual backdrop of this case there can be no question that IMWU has a very serious labor dispute with the plaintiff and IMWU's activities in support of its postion in the dispute are lawful.

IMWU began to organize the crews of the *Nassau* and *Victoria* in February of this year. Within two months it had succeeded in obtaining pledge cards from a majority of the unlicensed crew members designating IMWU as the union of their choice.

On April 13 I met with Mr. Berlingeri, President of the plaintiff, at his office at 39 Broadway, New York City,

[fol. 32] and informed him that the IMWU represented a majority of the seamen on his vessels. I also told him that I was desirous of negotiating a collective bargaining agreement on behalf of these seamen.

Without challenging the IMWU's majority status Mr. Berlingeri stated that he knew that representatives of the IMWU had been active among the crews and that he had no objections to IMWU's processing grievances on behalf of the crews. He requested only that IMWU representatives when boarding the vessels first announce themselves to the Masters.

While Mr. Berlingeri recognized IMWU for the purpose of processing grievances, he expressed himself as reluctant to enter into formal contractual relations with IMWU because he was apprehensive of the demands for wages and improved working conditions that would be made. He stated to me that he preferred to deal with an Italian union and that he would be willing to negotiate an agreement with some such organization which the IMWU could administer. I flatly rejected this strange proposal. However, the fact that it was made by Mr. Berlingeri was unwitting acknowledgment on his part that only an American union could effectively represent the crews of the Company's vessels. For, plainly, from the standpoint of their employment, New York City is the home port of the crews.

It might further be pointed out that while plaintiff's papers contain teasing hints (without clear-cut claims being made) that the crews of the *Nassau* and *Victoria* are repre- [fol. 33] sented by an Italian union, this is not the fact. IMWU is the only union designated by the crews to represent them, and no other union bargains on their behalf. The crews are simply without union representation of any kind at the present, and it is their desire for such representation that has touched off the present dispute.

On May 4, 1960, I again met with Mr. Berlingeri at his office at 39 Broadway to further urge recognition for IMWU. Once more Mr. Berlingeri, without challenging the majority status of IMWU, unequivocally stated that he preferred to deal with an absentee Italian union. The meeting adjourned with a clear understanding that Mr. Ber-

lingeri would contact me further on the matter no later than May 10.

When nothing was heard from Mr. Berlingeri on May 10, it became apparent that plaintiff had no intention of voluntarily recognizing IMWU. Within a day or two thereafter the decision was made to publicize the dispute between IMWU and plaintiff by means of picketing.

A peaceful and orderly picket line was thereafter established at a public location adjacent to Pier 42. As long as it continued the picketing was peaceful and orderly and unmarked by disturbance of any kind. The legends on the picket signs were truthful and there is no contention in the moving papers to the contrary. The signs read as follows:

> "We want better wages and working conditions for M/V. *Victoria* [SS. *Nassau*] seamen. This picketing [fol. 34] is only against the M/V. *Victoria* [SS. *Nassau*]. We have no dispute with any other employer."
>
> "M/V. *Victoria* [SS. *Nassau*] unfair. Refuses to recognize International Maritime Workers Union. This picketing is only against the M/V. *Victoria* [SS. *Nassau*]. We have no dispute with any other employer."

I categorically deny that IMWU, or any of its representatives, at any time threatened or coerced any one, least of all crew members. In point of fact, crew members of the *Nassau* voluntarily and in spontaneous protest left the vessel.

On May 16 IMWU's unfair labor practice charges against the Company which had been prepared three days earlier were filed with the National Labor Relations Board. The charges accuse the Company of violating the Taft-Hartley Act by reason of its refusal to recognize and bargain with IMWU. Filing of the charges was delayed until Monday of this week because there appeared to be a clear indication from Mr. Berlingeri, then at sea aboard the M/V. *Victoria*, that he was prepared to extend recognition and bargain in good faith with the IMWU. In this connection I annex to this affidavit as Exhibit "C" a copy of a radiogram which I addressed to Mr. Berlingeri on Friday,

May 13, following lengthy discussions with a Mr. Stevenson of the law firm of Gray & Wythe, attorneys for the plaintiff, and telephone conversations with Mr. Wolfson, President of Ineres Line Agency, Inc. The radiogram conveyed IMWU's assurances to Mr. Berlingeri that it was [fol. 35] prepared to withdraw the picket line if he would consent to recognize and bargain with IMWU. Mr. Berlingeri replied later that night that the proposal was acceptable, provided the conditions outlined in my radiogram were "not in conflict with the determination which will be taken at the next meeting of ITF in London regarding jurisdiction over the personnel of the SS. *Nassau* and M/V. *Victoria*."

Having imposed a condition not contemplated in my discussions with Mr. Stevenson and Mr. Wolfson, I rejected Mr. Berlingeri's counter-proposal and continued to picket.

Notwithstanding, on Monday, May 16, IMWU requested and received the cablegram from Omar Becu, President of ITF, (Exhibit B) which confirmed that the *Nassau* and *Victoria* were within IMWU's organizational jurisdiction. This clearance from ITF which had been imposed as a condition to recognition by Mr. Berlingeri on May 13, was brought to the attention of Company representatives, but the Company has nevertheless persisted in its refusal to negotiate with the IMWU.

That the Company is engaged in a deliberate campaign to defeat IMWU's organizational efforts and force its employees, regardless of their desires, to accept union representation agreeable to the Company, is conclusively established by the letter (annexed hereto as Exhibit "D") which Mr. Berlingeri circulated among the crew members today. By means of this letter Mr. Berlingeri seeks unlawfully to circumvent IMWU and deal directly with the crews. To entice the crews to abandon IMWU he holds out to them the promise that the Company, effective January 1, 1960, [fol. 36] will put into effect the conditions contained in a collective bargaining agreement negotiated by an Italian labor union. The very making of the promise belies any claim that the crews are presently represented by an Italian labor union.

The letterhead under which Mr. Berlingeri circulated his proposal to the seamen contradicts the contention of Mr. Wolfson that the plaintiff, Incres Steamship Company, Ltd., has no office in New York and is eloquent of the closeness of the corporate relationship between the plaintiff and Incres Line Agency, Inc. The letterhead reads as follows:

"INCRES LINE
Incres Steamship Co. Ltd.
INCRES LINE AGENCY INC.
General Agents
39 Broadway, New York 6, N. Y."

A full review of the facts conclusively demonstrates that plaintiff and defendants are engaged in a domestic labor dispute. Plaintiff's paper corporate manipulations by which it seeks to achieve the appearance of a Liberian nationality should be tagged for the fictions that they are. Plaintiff should not be permitted to insulate itself from the legitimate demands of its employees for IMWU representation on the pretext that it has no office in the United States. Plaintiff does business nowhere else but in the United States. Plaintiff should particularly be denied the unique and extraordinary immunity it seeks in view of the sketchy set of moving papers it relies on, which are based largely [fol. 37] on hearsay and conclusory allegations.

For all of the foregoing reasons and for the additional reasons contained in defendants' memorandum of law, I respectfully pray that plaintiff's motion for a preliminary injunction be in all respects denied and the temporary restraining order vacated, and that defendants' cross-motion to dismiss the complaint be granted.

Shannon J. Wall.

(Sworn to May 17, 1960.)

[fol. 38]

EXHIBIT A, ANNEXED TO AFFIDAVIT OF SHANNON J. WALL, READ IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION

Charge Against Employer.

(See opposite) ☞

Form NLRB-501
(9-53)

Form approved
Budget Bureau No. 64-R001.6

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

Compliance Status Checked By

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

NAME OF EMPLOYER: Ineres Steamship Company Ltd, Also known as Ineres Line

NUMBER OF WORKERS EMPLOYED: 490

ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State):

39 Broadway, Room 1908
New York, New York

TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.): Steamship Company

Identify principal product or service: Shipping

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (5) (list subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The Employer since on or about April 13, 1960 has violated Section 8 (a) (5) of the Act by refusing to recognize and bargain in good faith with the Union, the duly designated collective bargaining representative of the unlicensed personnel (non-supervisory) employed aboard its vessels, S.S. NASSAU and M/V VICTORIA.

By the foregoing and by other acts and conduct the Employer has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

By the foregoing and by other acts and conduct the Employer has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
International Maritime Workers Union

4. Address (Street and number, city, zone, and State) | Telephone No.
265 West 14th Street, New York 11, New York | ORegon 5-9000

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filed in when charge is filed by a labor organization)
same

6. Address of National or International, If any (Street, and number, city, zone, and State) | Telephone No.
same | same

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

INTERNATIONAL MARITIME WORKERS UNION

By [redacted] (Representative or person filing charge)

May 13, 1960 — Executive Director
(Date) — (Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 80)

U. S. GOVERNMENT PRINTING OFFICE 16-57900-6

[fol. 40]

EXHIBIT B, ANNEXED TO AFFIDAVIT OF SHANNON J. WALL, READ IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION

Telegram.

(Form of RCA COMMUNICATION, INC.)

BR75 NY391 OPH2678
LONDON 19 16 1712
ENEMU NEW YORK

CONFIRM THAT UNION JURISDICTION FOR VESSELS NASSAU AND VICTORIA SHOULD BE WITH UNITED STATES MARITIME UNION
INTRANSFE

[fol. 41]

EXHIBIT C, ANNEXED TO AFFIDAVIT OF SHANNON J. WALL, READ IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION

Radiogram

Mr. V. Berlingeri
M/V *Victoria*
At Sea—Caribbean

I. M. W. U. will accept Berlingeri's assurance that promptly on arrival at New York of *Victoria* he will begin negotiations in good faith with I. M. W. U. for collective bargaining agreement on behalf of unlicensed non-supervisory personnel employed on *Nassau* and *Victoria*. Foregoing being subject to any valid collective bargaining contract between Italian Union and Incres, if one exists. Incres guarantees no recriminatory action against crew. Mr. Wolfson on behalf of Incres to be authorized to confirm such assurances to I. M. W. U.

Upon compliance by you with foregoing through your designated Agent Wolfson the picket line will be withdrawn and crew will sail SS. *Nassau*.

s/ SHANNON WALL

EXHIBIT D, ANNEXED TO AFFIDAVIT OF SHANNON J. WALL, READ IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION

Letter Ineres Line Circulated Among the Crew Members

(Omitted, same as defendants' Exhibit A-1, printed at pp. 240-242, *infra*.)

[fol. 42]

IN SUPREME COURT OF THE STATE OF NEW YORK

AMENDED ANSWER

The defendants, International Maritime Workers Union (IMWU) and Shannon J. Wall, by their attorneys, Cooper, Ostrin & DeVarco and Miller & Seeger, for their answer to the complaint, allege as follows:

1. Deny each and every allegation contained in paragraphs "10", "14", "17", "18", "19", "20", "21", "23", "24" and "25".

2. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs "4", "6" and "9".

3. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "1", except deny that plaintiff "has its principal office in Monrovia, Liberia".

4. Deny each and every allegation contained in paragraph "3", except admit that defendant Shannon J. Wall is "a resident of the State of New Jersey".

5. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "7", except admit that on or about May 13, 1960, the SS. *Nassau* entered the Port of New York and docked at Pier 42, North River, New York City, where it presently remains.

[fol. 43] 6. Deny each and every allegation contained in paragraph "11", except admit that on May 13, 1960, the crew members of the SS. *Nassau* voluntarily engaged in a strike in response to a request by IMWU.

7. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragaph "12", except admit that "persons in the picket lines carried signs demanding that plaintiff recognize IMWU as the vessel's bargaining agent".

8. Deny each and every allegation contained in paragraph "13", except admit that on May 13, 1960, IMWU representatives requested crew members of the SS. *Nassau* to engage in a strike, and that the vast majority of crew members voluntarily responded to the request.

9. Deny each and every allegation contained in paragraph "15", except admit that IMWU has demanded recognition as bargaining agent for the unlicensed crew members of the MS. *Victoria*.

10. Deny each and every allegation contained in paragraph "16", except admit that IMWU seeks by picketing to obtain recognition as the bargaining representative for unlicensed crew members.

11. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "22", except deny that any of the activities of IMWU are "unjust and unwarranted, all to plaintiff's irreparable damage".

[fol. 44] *First Complete Affirmative Defense*

12. IMWU is an American maritime "labor organization" engaged in "commerce" and in an industry "affecting commerce" as the quoted terms are defined in the Labor

Management Relations Act of 1947 (LMRA) (29 U. S. C. A. §§141, 152), and the concerted activities of IMWU are subject to regulation under the LMRA.

13. IMWU admits to membership all seamen regardless of race, color, creed or nationality.

14. IMWU was formed in 1959 for a twofold purpose:

(a) To organize and represent all seamen employed aboard vessels whose flags are foreign to the United States of America and whose ultimate ownership or control has no substantial connection with the country of registry, in order to insure to those seamen just and fair treatment, and to improve and protect their wages, their hours of labor and their working conditions.

(b) By so organizing and representing such seamen and improving their job conditions, which are substandard, IMWU aims at alleviating the detrimental effects those conditions have on the superior job standards and the job opportunities of American seamen employed aboard American flag vessels under collective bargaining agreements negotiated by the National Maritime Union of America, AFL-CIO (NMU), and the Seafarers International Union of North America, AFL-CIO (SIU).

[fol. 45] 15. NMU and SIU are American maritime "labor organizations" engaged in "commerce" and in an industry "affecting commerce" as the quoted terms are defined in the LMRA.

16. NMU and SIU together represent the overwhelming majority of organized American seamen employed aboard American flag vessels, and both organizations have supported the formation of IMWU.

17. As a result of collective bargaining, the wages, hours, fringe benefits, job security and other working conditions enjoyed by the unlicensed seamen represented by NMU and SIU are the finest in the world.

18. The plaintiff is an "employer" engaged in "commerce" and in an industry "affecting commerce", as the quoted terms are defined in the LMRA.

19. Plaintiff owns and operates two passenger cruise vessels which regularly sail between New York City and Caribbean ports. Plaintiff's cruises begin and terminate in New York, and plaintiff's passengers are almost exclusively American citizens.

20. In the operation of its two cruise vessels plaintiff employs approximately five hundred unlicensed seamen.

21. In or about February, 1960, IMWU commenced to organize the unlicensed crew members of the *Nassau* and [fol. 46] *Victoria*. By April, 1960, IMWU had succeeded in obtaining signed pledge cards from a majority of said crew members who indicated by the signing of the cards that they desired to become members of IMWU and to be represented by IMWU for the purposes of collective bargaining.

22. On or about April 13, 1960, IMWU demanded recognition from plaintiff as the bargaining representative for the unlicensed crew members of the *Nassau* and *Victoria*, and representatives of IMWU met on that day and a number of times thereafter with representatives of plaintiff for the purpose of discussion and negotiation with respect to recognition and also with respect to certain pressing grievances for which the crew members of the *Nassau* and *Victoria* were demanding prompt redress.

23. Several minor grievances were resolved in the course of such meetings, but plaintiff, resorting to various dilatory tactics, repeatedly sought to avoid formal recognition of IMWU as the bargaining representative for the unlicensed crew members of the *Nassau* and *Victoria* or negotiations with IMWU on major economic issues, although plaintiff did not once question IMWU's majority status.

24. On May 13, 1960, IMWU commenced picketing plaintiff's vessels at their regular pier in New York City, and the picketing was supported by a strike of the overwhelming majority of the crew members of both vessels.

25. The picketing was at all times peaceful and orderly and the number of pickets at any one time was limited to [fol. 47] three. The legends on the picket signs carried by

the pickets were truthful and non-deceptive and read as follows:

> "We want better wages and working conditions for SS *Nassau* [M/V *Victoria*] seamen. This picketing is only against the SS *Nassau* [M/V *Victoria*]. We have no dispute with any other employer."
>
> "SS *Nassau* [M/V *Victoria*] unfair. Refuses to recognize International Maritime Workers Union. This picketing is only against the SS *Nassau* [M/V *Victoria*]. We have no dispute with any other employer."

26. The object of the picketing was to require plaintiff to recognize IMWU as the majority representative of plaintiff's unlicensed crew members, and to protest the substandard wages and working conditions under which said crew members were employed by plaintiff.

27. On May 16, 1960, IMWU filed unfair labor practice charges against plaintiff with the National Labor Relations Board alleging that plaintiff had violated Sections 8(a)(1) and (5) of the LMRA by its refusal to bargain collectively with IMWU as the designated majority representative of the crews.

28. Plaintiff's shipping operations are competitive with the shipping operations of ship operators under collective bargaining agreements with NMU and/or SIU. Because the terms and conditions of employment of its unlicensed crew members are inferior and substandard, plaintiff's [fol. 48] labor costs are substantially lower than the labor costs of the competing ship operators who are parties to collective agreements with NMU and/or SIU.

29. This differential in labor costs operates to the competitive advantage of plaintiff, and the competitive disadvantage of the ship operators who are bound by collective agreements with NMU and SIU.

30. Numerous detrimental economic consequences are experienced by NMU and SIU and the unlicensed seamen they represent as the result of this inequality in labor costs between plaintiff and competing operators under contract with NMU and/or SIU.

31. By reason of the foregoing, this Court lacks jurisdiction of the subject of the action and exclusive jurisdiction lies with the National Labor Relations Board.

Second Complete Affirmative Defense

32. Repeat and reallege each and every allegation contained in paragraphs "12" to "31" above.

33. By reason of the foregoing, defendant's conduct complained of in the complaint was a lawful exercise of rights afforded by the Labor Management Relations Act, 1947.

Third Complete Affirmative Defense

34. Repeat and reallege each and every allegation contained in paragraphs "12" to "31" above.

[fol. 49] 35. By reason of the foregoing, defendant's conduct was a lawful exercise of rights afforded by the Constitution of the United States.

Fourth Complete Affirmative Defense

36. Repeat and reallege each and every allegation contained in paragraphs "12" to "31" above.

37. The existing controversy between plaintiff and defendants constitutes a labor dispute under Section 876-a of the Civil Practice Act of New York, and the allegations of the complaint fail to comply with said Section.

38. By reason of the foregoing, the complaint on its face fails to state a cause of action.

Fifth Complete Affirmative Defense

39. Repeat and reallege each and every allegation contained in paragraphs "12" to "31" above.

40. By reason of the foregoing, defendants' conduct constitutes a lawful exercise of rights afforded by the Constitution and common law of the State of New York.

Wherefore, defendants IMWU and Shannon J. Wall demand judgment dismissing the complaint, together with the

costs and disbursements of this action, and such other and further relief as to the Court may seem just and proper.

Cooper, Ostrin & DeVarco, Miller & Seeger, Attorneys for Defendants, IMWU and Shannon J. Wall.

[fol. 50]

IN SUPREME COURT OF THE STATE OF NEW YORK

Transcript of Testimony—May 18, 1960

County Court House, Room 130
60 Centre Street
New York, New York.

Before: Hon. Henry Clay Greenberg, Justice.

APPEARANCES:

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for plaintiff, by Breck P. McAllister, Esq. and Walter L. Stratton, Esq., of counsel.

Cooper, Ostrin & De Varco, Esqs., Attorneys for defendants International Maritime Workers Union and Shannon J. Wall, by H. Howard Ostrin, Esq., of counsel, and Miller & Seeger, Esqs., by Harold L. Young, Esq., of counsel.

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[fol. 66] Afternoon Session

Mr. McAllister: * * *

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[fol. 69] I should like to mention very briefly the Labor Board cases, because I think as a result of the decision in the *Benz* case the Labor Board will quickly dismiss the petition which has been filed here only yesterday or the day before, as I understand it, as soon as the facts are made plain to the Board, which, of course, they were not in this particular petition which has just been filed. This

petition is no more than writing a letter to the District Attorney, you might say.

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[fol. 70] The head office of the company, of the Steamship Line, as we will show, is in London; • • •

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[fol. 87] The Court: I don't think that there will be very much left of the main motion if ultimately I should come to the conclusion that this Court has jurisdiction. I think you will agree with me on that.

Mr. Ostrin: I am sorry. I would like to clear the record. Your Honor stated there won't be anything left to the main motion if you decide that there was jurisdiction?

The Court: Not very much left.

Mr. Ostrin: I respectfully disagree. I think we have a very meritorious case on the merits of the case. I am not prepared to concede.

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ALBERT J. RUDICK, residing at 2 Ridge Crest North, Scarsdale, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAllister:

Q. Are you an American citizen?

A. Yes, I am.

[fol. 88] Q. What office do you presently hold?

A. I am Deputy Commissioner of Maritime Affairs for the Republic of Liberia.

Q. How long have you held that office?

A. Since May of 1955.

Q. And where is your business office located?

Mr. Ostrin: In the interest of expediting the hearing I will concede this vessel is not registered here, if that is what he wants.

The Court: Let us get the record clear.

A. My office is at 103 Park Avenue, New York.

The Court: Do you hold that office pursuant to an order of the Liberian Government?

The Witness: Yes. I was appointed by the President of the Republic of Liberia.

Q. And to whom do you report?

A. I report to Albert Maraquay, the Commissioner of Maritime Affairs in Monrovia, Liberia.

Q. Will you explain very briefly your functions and duties as Deputy Commissioner?

A. As Deputy Commissioner my functions deal with the registration of vessels under the Liberian flag, the issuance of ship radio station licenses and officers' licenses in connection with these ships, the recording of mortgages, the keeping of records in connection with Liberian flag ships.

Q. Are the two vessels we are here concerned with, the SS. *Nassau* and the *SS. Victoria* registered under the Republic of Liberia?

A. Yes, both vessels are.

Q. And how do you know that?

A. Because I am personally in charge of the records. I [fol. 89] have signed, with respect to the *Victoria*, all the documents in connection with that vessel. As to the other, as to the *Nassau*, all of them except the certificate of registry which was issued before I took office.

Mr. McAllister: I ask that this paper be marked for identification.

(Plaintiff's Exhibit 1 marked for Identification.)

Q. Will you explain what that is, please (handing Plaintiff's Exhibit 1 for identification)?

A. This is a certificate of permanent registration number 2-55 for the SS. *Nassau*, showing she has a Liberian flag official number 5-27.

Q. Does it show the ownership?

A. Yes, it shows the ownership of this vessel: Ineres Steamship, Ltd., Liberian Citizen, a Liberian corporation.

Mr. McAllister: I offer this in evidence, your Honor.

(Certificate previously marked Plaintiff's Exhibit 1 for Identification marked in evidence.)

Mr. McAllister: We would ask leave to substitute a photostat, since that is one of the original records of the Commissioner's office.

Mr. Ostrin: No objection.

(Photostat received in evidence and marked Plaintiff's Exhibit 1-A.)

The Court: The plaintiff is a Liberian corporation?

[fol. 90] The Witness: Yes, sir.

The Court: Does it show who the officers and directors are?

The Witness: No.

The Court: Do you know?

The Witness: No, sir.

Mr. McAllister: We have the officers in court.

Q. Does this certificate show where the vessel was built?

A. Yes, it does. It shows that she was built in New Castle on the Tynes in England in 1922.

Q. What was the previous registry of the *Nassau*, do you know?

A. Yes. The immediate previous registry of the *Nassau* was Panamanian flag.

Q. Do you have records showing this?

A. Yes, I do. Before any vessel is accepted for registry under the Liberian flag we investigate and make sure that, number one, the ship itself is acceptable and to see where she is coming from and if she comes from another registry we require that she be stricken from the other registry. That is one of the documents we require.

Q. Do you have any records showing any other registry than that which you have just testified to?

A. Well, yes. As I said, when we have a vessel coming in for registration we investigate as to the vessel itself, where she was built, when she was built, under what registry it had previously been, and our investigation shows this vessel was built in 1922, was registered under the British flag under the name "*Mongolia*". Then in 1938, I believe it is, her name was changed to "*Rimutaka*," and she was also then under the

[fol. 91] British flag. In 1950, she was sold and placed under Panamanian flag under the name "*Europa.*" All these names appear on the certificate of registry because we have a notation calling for the former names.

The "*Europa*" was registered under the Panamanian flag and then in 1950 or 1951, I believe, her name was changed to "*Nassau,*" was still under Panamanian flag, and in 1954, under the name "*Nassau*" she was registered under the Liberian flag after she was stricken from the Panamanian flag.

Q. Is the vessel still registered under the Liberian flag?

A. Yes, she is.

Mr. McAllister: Will you please mark this for identification.

(Plaintiff's Exhibit 2 marked for Identification.)

Q. Will you please state what that document is (handing witness Plaintiff's Exhibit 2 for Identification)?

A. This is Liberian permanent certificate of registry number 65-60, the Liberian flag. The vessel: The *Victoria.*

Q. That is the document marked Exhibit 2 for Identification?

A. Yes.

Q. Does this certificate show the present ownership and nationality of the owners?

A. Yes. It shows that the owner is the Incres Steamship Company, Ltd. Citizenship is Liberian.

Mr. McAllister: I offer it in evidence.

Mr. Ostrin: No objection.

(Plaintiff's Exhibit 2 for Identification now marked in evidence.)

[fol. 92] Mr. McAllister: May I ask that a photostat of this document be substituted for the original and marked as Plaintiff's Exhibit 2-A.

(Plaintiff's Exhibit 2-A marked in evidence.)

Q. Mr. Rudick, has the ownership nationality of this vessel remained unchanged since that certificate of registry was issued by you or your office?

A. Yes, it has, it is unchanged.

Q. Does this certificate, like the earlier one, show when and where the vessel "*Victaria*" was built?

A. Yes. This vessel was built in 1937 at Belfast, North Ireland.

Q. And does it show the former registry and ownership of the vessel?

A. It shows the former name, which was the "*Dunnoctar Castle.*" She was formerly under British registry; I believe owned by the Union Castle Line. I have in my files a cancellation of the British registry because she was sold to Incres Steamship Company, Ltd. for registration under the Liberian flag.

Q. Can you state whether or not this vessel is still validly registered under the Liberian flag?

A. She is.

Mr. McAllister: Your witness.

Cross examination.

By Mr. Ostrin:

Q. Mr. Rudick, you are the Deputy Commissioner of Maritime Affairs?

A. Of the Republic of Liberia.

Q. And how long have you held that position?

A. Since May, 1955.

[fol. 93] Q. That was by appointment?

A. Yes, sir.

Q. Did you apply for it?

A. I was appointed.

Q. They just didn't pick your name off the air, did they?

A. Well, I am a maritime attorney and they were looking for someone with experience, someone with the proper background, and they hired me.

Q. You are a maritime attorney and you are admitted to practice in New York State?

A. Yes, sir.

Q. And they sought you out?

A. In a sense, yes, sir.

Q. Did you receive a letter from them?

A. I was asked to speak to the Ambassador and other people connected with Liberia.

Q. The Ambassador here in the United States?

A. The Liberian Ambassador, yes.

Q. And do you know whether there are any other Deputy Commissioners such as yourself in any other part of the world?

A. No, there is only one Deputy Commissioner's office and that is here in New York at the present time.

Q. Aside from you, are there any other employees that are engaged in this particular operation with you in New York?

A. I have a staff which I hire on a contract basis and I pay for them.

Q. Where do you maintain your office?

A. 103 Park Avenue.

Q. Is that with your law office?

A. No.

Q. When you say that the *Victoria* was owned by a Liberian citizen, do you mean it is owned by a corporation organized under the laws of the Republic of Liberia; is that right?

A. Yes. The Republic of Liberia considers Liberian citizens corporations as well as individuals.

[fol. 94] Q. And I suppose your answer would be the same with respect to the ownership of Incres?

A. Incres?

Q. I don't mean Incres. Withdrawn. Of the *Nassau*.

A. I said it was the same ownership; yes, sir.

Q. And that is a Liberian formed corporation, is that right?

A. A Liberian corporation, yes.

Q. And you don't know who the officers of this corporation are, do you?

A. No, I do not.

Q. Is it part of your functions to ascertain who the officers are?

A. No, it is not.

Q. You are not interested in that; are you?

A. I am interested in the fact that she has to be a valid Liberian corporation in good standing.

Q. That means that it is organized under the laws of the Republic of Liberia?

A. I have been informed by Liberia that she is a Liberian corporation.

Q. Is it part of your functions to ascertain or determine the nature of the voyages of vessels flying the Liberian flag?

A. By "nature" I gather you mean where they go?

Q. Where they go?

A. The Republic of Liberia, as I understand it, has the same restrictions that the United States has, C-1 and C-2, that is, trade with Communist countries. It places no restrictions whatsoever upon where vessels may go.

Q. So that the Republic of Liberia doesn't care where the *Nassau* or the *Victoria* goes?

A. If they don't go to a Communist country.

Q. That is all?

A. Yes.

Q. You know that these vessels—I am referring to the *Victoria* and the *Nassau*—regularly operate between New York City and the Caribbean, is that right?

A. You asked me, do I know?

[fol. 95] Q. Yes.

A. I heard talk to that effect, yes. I also know that the *Nassau* goes over to Italy and the *Victoria* I think, has a couple of cruises around the world.

Q. How often does the *Nassau* go to Italy?

A. I do not know.

Q. How many cruises does the *Victoria* make around the world?

A. That I don't know either.

Q. On the cruises that the vessel makes around the world where does the voyage originate?

A. In the United States.

Q. From New York, is that right?

A. I believe so.

Q. Have you ever had occasion to communicate with representatives of the Ineres Line in connection with your duties?

A. Yes.

Q. And with whom have you communicated?

A. I usually write the company.

Q. Where?

A. You are talking about the owners of the ship?

Q. I am asking you whether you ever had occasion to communicate with representatives of the Ineres Nassau line?

A. Ineres Nassau Line, yes. I have communicated with Mr. Barnett in London in connection with the registration of this vessel and the *Nassau*.

Q. That was in connection with the registration. Has there been any other communication?

A. Yes, there has.

Q. Will you tell us about the others?

A. Well, since the vessel has been registered I have communicated with London a number of times.

Q. Have you ever communicated with the company's office at 39 Broadway?

A. You mean Ineres Steamship Company, Ltd.?

[fol. 96] Q. Yes. I have several names here. There is Ineres Line. Did you ever communicate with an Ineres Line located at 39 Broadway?

A. I believe I have.

Mr. McAllister: Your Honor, may I object to that question. It assumes that Ineres Line itself has its office at 39 Broadway. There has been no such showing.

The Court: Sustained.

Q. Did you ever communicate with anybody at 39 Broadway concerning the Ineres Line or concerning the vessels *Victoria* or *Nassau*?

A. I believe I may have, yes.

Q. With whom, do you know?

A. I don't know.

Q. And what form did that communication take? Was it in writing or was it by telephone?

A. Most of the time by writing. There have been telephone conversations.

Q. When you wrote to 39 Broadway, did you address it to any particular company?

A. Well, I must have, yes.

Q. Do you recall the name of the company that you used when you communicated with someone at 39 Broadway?

A. Since there are several companies involved in here, —I mean you have given me names, I am not quite sure which of them.

Q. Did you ever communicate with an Incres Line at 39 Broadway?

A. An Incres Line? You are not speaking of the registry ownership?

Q. I don't know, I am just asking you, did you ever communicate with an Incres Line?

A. Yes, I believe I have.

Q. And did you communicate with any particular person at Incres Line at 39 Broadway?

A. Let us put it this way: I have communicated with [fol. 97] a Mr. Wolfson. Whether he is with Incres or not, I don't recall right now.

Q. What was the nature of your business with Mr. Wolfson when you communicated with him? What did you talk about?

A. With respect to the two vessels.

Q. The operation of the two vessels?

A. By operation you mean—

Q. When you say you communicated with him in connection with the two vessels, I would like to know specifically.

A. All right, questions that may have arisen concerning perhaps some documents required in connection with these vessels.

Q. In connection with its registry?

A. In connection with the officers' licenses.

Q. By officers you mean those who work aboard these two vessels?

A. Yes.

Q. And you communicated with Mr. Wolfson, is that right?

A. Yes.

Q. Did he ever communicate with you on that?

A. Yes.

Q. And did you get the information that you needed when you communicated with him?

A. I guess so; yes.

Q. Did you ever receive correspondence from him?

A. Yes.

Q. Do you have that correspondence in your files?

A. Yes.

Q. Will you arrange to produce those, sir?

A. May I say something. I think I would have to communicate with my attorney, since mine is an official office of a sovereign government. I have to consult to see whether or not the Government itself would want to make them available.

Mr. Ostrin: I respectfully request, if your Honor please, [fol. 98] that the witness be directed to produce correspondence with Mr. Wolfson.

The Court: I think I am in a similar position as the witness. I would like to have some light on that, as to whether I may.

Mr. Ostrin: Let us see what they are, and your Honor can then tell.

Mr. McAllister: Your Honor, I don't think there has been any showing of the relevance of this extraordinary request made in court here this afternoon. We are going to have before us the officers of the corporation involved here. Mr. Wolfson will testify, Mr. Berlingeri, the president of the steamship company. They will testify directly.

Mr. Ostrin: I think there is a great deal of relevancy in this, your Honor. This man has testified that he has spoken to Mr. Wolfson concerning the registry of the vessels, concerning the officers of the vessels. This is precisely the point I would like to make.

Q. Did you ever communicate with any other person at 39 Broadway concerning the *Nassau* or the *Victoria?*

A. Yes, a Mr. Jordan.

Q. Mr. Jordan?

A. Yes.

Q. How do you spell that?

A. J-o-r-d-a-n.

Q. And do you know what connection he has with the two vessels.

A. I think that was in connection with the officers' licenses.

Q. Also with regard to officers' licenses?

A. Yes.

Q. Have you received correspondence from Mr. Jordan?

A. It is quite possible, yes.

[fol. 99] Q. Is there any other person that you communicated with at 39 Broadway concerning the *Victoria* and the *Nassau?*

A. I don't believe so.

Q. Do you know a Mr. Berlingeri?

A. Yes, I do.

Q. Will you tell us how you know him?

A. I have met him socially.

Q. Do you know whether he occupies any position in connection with the Incres Line or the two vessels?

A. I believe he is associated now at the same address.

Q. At 39 Broadway?

A. If that is the address, yes.

Q. Did you ever meet him there?

A. I don't believe I have ever met him there.

Q. You met him socially?

A. Yes.

Q. Where?

A. I met him on board.

Q. In New York?

A. Yes. I met him on board the *Victoria.*

Q. Did you ever meet him in New York, socially?

A. I think I have a recollection. I am not quite sure.

Q. Can you reach him at 39 Broadway if you want to?

A. I think I probably could. I might be able to.

Q. Do you know whether he resides in New York?

A. No, I do not.

Q. Do you know whether he occupies any office in Incres Steamship Company, Ltd., or the Incres Line?

A. As a fact?

Q. Yes.

A. You are asking me as a fact?

Q. Yes.

A. You are asking me a fact, or what I believe?

Q. Well, do you know as a fact?

A. No.

Q. Have you ever had occasion to discuss or communicate with Mr. Berlingeri concerning the *Nassau* or the [fol. 100] *Victoria?*

A. No, I don't believe I have written him.
Q. Pardon me?
A. I don't believe I have written him.
Q. Have you spoken to him?
A. Yes.
Q. In what connection, sir?
A. Well, I was on the *Victoria*.
Q. You mean recently?
A. Yes.
Q. These certificates are issued in New York, is that right?
A. These are, yes.
Q. What is done with them then? They are mailed to where?
A. The original certificate goes on board the ship, one copy is kept in my office, and two copies are sent to the offices of the Commissioner in Monrovia.
Q. The office of the Commissioner?
A. Yes.
Q. These vessels are registered under the Liberian flag, isn't that right?
A. Yes, sir.
Q. And the Liberian Government determines whether or not these vessels should be so registered, is that right?
A. That is right.
Q. And that is not your determination, is it, whether these certificates should be issued?
A. No. When an application comes in, it has to come into my office.
Q. You would forward it on?
A. I communicate with Liberia with respect to an official number, a radio call asking them to check.
Q. And then they authorize you to issue the documents?
A. That is right. You notice, the documents are issued, it says The Commissioner of Maritime Affairs by.
Q. The decision is made in Liberia, documents are issued by you, and then they are sent back to Liberia; is that the procedure, orat least two copies?
A. Yes.
[fol.101] Q. Explain why the documents are not issued directly out of Liberia, if you know.

A. Yes. The ship may be registered either here or in Liberia. If the application was filed directly in Liberia, the document would have been issued there.

Q. Mr. Rudick, in the back of Exhibit 2 there is reference to a mortgage; right?

A. Yes.

Q. Do you have a copy of Exhibit 2 in front of you?

A. No, I don't.

Q. There is a reference to a mortgage, is that right?

A. Yes.

Q. And is the name of the mortgagee indicated?

A. That is right, it is.

Q. And what is the name of the mortgagee?

A. Bank of America.

Q. And that is a New York bank?

A. The Bank of America?

Q. Yes.

A. I thought it was a California bank.

Q. It is an American bank, isn't it?

A. Yes.

Q. So I understand it that the Bank of America has extended a mortgage loan to the owner of the *Victoria* on the basis of the endorsement appearing on the back of Exhibit 2?

A. Yes.

Q. And is the amount indicated?

A. Yes, it is.

Q. Will you tell us what the amount is, please?

Mr. McAllister: Your Honor, the document speaks for itself.

The Court: Overruled.

A. The amount is $4,000,000.

Q. And that mortgage loan is still outstanding?

A. There are two mortgages on this vessel. There is one to a foreign mortgagee, Fiat. You are speaking about both mortgages, I assume?

[fol. 102] Q. I am interested in the American one. If you want to put the other one in, go ahead. The mortgage with the Bank of America is for $4,000,000, is that right?

A. That is correct.

Q. And that loan is still outstanding?

A. As far as the records would show, yes.

Q. Now, will you look at Exhibit 1, please. Is it correct that there is an indication of mortgage financing there with respect to the *Nassau*?

A. Yes.

Q. Will you tell us who the mortgagee is?

A. I see the first mortgage to the Bank of America.

Q. In what amount?

A. And a second mortgage to a foreign mortgagee, Fiat.

Q. What is the amount of the first mortgage?

A. $4,000,000. This is a fleet mortgage. It covers both ships.

Q. When was that issued?

A. The mortgages, I don't have a date, but it was endorsed, the original mortgage was endorsed on April 7th, 1959.

Q. Recently issued, is that right?

A. The other mortgage to the foreign mortgagee was in January, 1960.

Q. And the amount on that is what?

A. $139,779.

Q. The $4,000,000 loan was extended to the owners by the Bank of America, is that right?

A. That is true. Some of our ships have much greater ones with British bankers.

Q. We are addressing ourselves to these vessels.

Mr. Ostrin: I move that so much of the answer which refers to other ships be stricken.

The Court: What is it?

[fol. 103] Mr. Ostrin: The witness started to testify about mortgages covering other ships and I requested that that portion of his answer be stricken. I ask your Honor for a ruling.

The Court: I will strike it out.

Q. Do you know, Mr. Rudick, whether either the "*Nassau*" or the "*Victoria*" has ever been to a Liberian port?

A. No, I do not know.

Q. Do you know whether the Liberian Republic inspects either the "*Victoria*" or the "*Nassau*"?

A. Most definitely they do.

Q. Where?

A. They inspect them through their agents, which are the Classification Society, wherever the Society can get the vessel.

Q. Where would that be?

A. It could be anywhere. It could be when it is in Italy, when it is in the United States, or anywhere.

Q. What is the Classification Society?

A. In this particular case, Lloyds Registry of Shipping.

Q. What does their inspection consist of, do you know?

A. Their inspection consists of full compliance with the International Convention for safety of life at sea. It requires a safety certificate for the vessel, the same requirement as any other vessel would be required in any other country that is signatory to the Convention.

Q. Do you know whether these vessels are also inspected regularly by the United States Coast Guard?

A. I imagine any foreign flag vessel coming into a U. S. port would be subject to inspection by the United States Coast Guard and the United States Department of Health.

Q. Inspected for the purpose of safety to passengers?

A. Under the International Convention of safety of life at sea every signatory has a right and does inspect [fol. 104] every ship coming into its port, whether it is Liberian, British, or other.

Mr. Ostrin: I have no further questions.

Redirect examination.

By Mr. McAllister:

Q. Mr. Rudick, you identified Fiat?

A. Yes.

Q. As one of the mortgagees. What is that?

A. I imagine they are the people that supplied the machinery for the "*Victoria*."

Q. Do you know the identity of Fiat?

A. It is an Italian company.

Q. In connection with officers of vessels of Liberian registry do you issue licenses for such officers?

A. Yes, I do.

Mr. McAllister: No further questions.

VINCENZO BERLINGERI, residing at 415 West 52nd Street, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAllister:

Q. Mr. Berlingeri, of what country are you a citizen?

A. Italy.

Q. What office do you hold in the plaintiff corporation, Ineres Steamship Company, Ltd.?

A. I am the president.

Q. And of what country is that a corporation?

A. Liberia.

Q. And does it own the two vessels, the SS. *Nassau* and the SS. *Victoria?*

A. Yes.

[fol. 105] Q. Where is the principal office of this corporation?

A. London.

Q. What is the nationality of the other officers of the plaintiff corporation?

A. Italian.

Q. Do you know the nationality of the stockholders of the plaintiff corporation?

A. Yes, I do.

Q. What is their nationality?

A. Italian.

Mr. McAllister: No further questions.

The Court: Do they live in Italy?

The Witness: They do.

Cross examination.

By Mr. Ostrin:

Q. Are you a stockholder of the corporation?
A. Unfortunately, no.
Q. You live here in New York?
A. Not all the time.
Q. Do you have an apartment in New York?
A. Yes.
Q. A residence of yours? You live here?
A. Yes, when I stay in New York I live there.
Q. And do you have an office in New York?
A. Yes.
Q. And where is your office located?
A. At 39 Broadway, at the office of the Incres Line I have a room for myself.
Q. You have a room for yourself for Incres Line?
A. No, for myself. The Incres Line premises has a room which I use.
Q. When you say Incres Line, do you mean Incres Steamship Company?
A. Not Incres Line Agency.
Q. You have an office there?
A. Yes.
Q. For yourself?
A. Yes.
[fol. 106] Q. And at this office you transact your business on behalf of Incres Steamship Company, Ltd.?
A. Yes.
Q. What is the nature of the business you transact at 39 Broadway?
A. Well, mainly the operation of the ship. Strictly the operation of the ship.
Q. Is it correct to say that the operations of the two vessels are conducted under your supervision and control out of your office at 39 Broadway?
A. No, it is not correct, because Incres Line Agency is acting as any other steamship agency. It is acting here in New York like our agency in Nassau, H. Curley & Fink, which means that they are taking care of all of the prob-

lems connected with the arrival, with the departure, with the booking of the passengers, the provisions, and other things.

Q. What do you have to do with the operation of the vessel? Personnel?

A. In what sense, hiring and discharging?

Q. Well, dealing with the personnel on the vessel, does that come under your duties and functions?

A. Dealing on a personal basis, yes. In other words—.

Q. Can you elaborate on that when you say dealing on a personal basis?

A. Yes, I can.

Q. Will you do so, please?

A. Certainly. Say, for instance, crew members come to me explaining their family problem or a personal desire, a personal matter. Someone wishes, for instance, if I can do something in order to move them from one lower rank to an upper rank.

Q. Promotion or demotion?

A. No. Say, for instance, one would want to be from a lower rank promoted to a superior rank.

[fol. 107] Q. You discuss that with them?

A. No, I don't. I discuss that with them. I said personal matters.

Q. Do you ever have any dealings with the Masters of either the "*Victoria*" or the "*Nassau*"?

A. In what sense do you mean?

Q. Concerning the operation of the vessel?

A. Of course.

Q. What sort of dealings?

A. Going aboard every time the ship arrives here to take a look how things are.

Q. How the vessel is functioning?

A. How things are kept; how the general appearance of the ship is.

Q. Does the Master of the vessel ever report incidents that may have occurred aboard the vessel while on voyage?

Mr. McAllister: Objection to that, your Honor. I don't think that is proper.

The Court: I will allow it. You may answer.

A. Does the Master report to me?

Q. Yes, incidents that occur on board the ship.

A. Concerning passengers?

Q. Or crew?

A. He might. In other words, it is not an established rule of the Line that he should report to me.

Q. Does he report to you?

A. I said it is not a rule.

Q. Whether it is a rule or not, does he report to you?

A. He might.

Q. Has he reported to you?

A. Sometimes.

Q. Has he reported the incidents that have been occurring on the two vessels within the last few days?

[fol. 108] Mr. McAllister: Your Honor, I object to that. He should confine this to the basic jurisdictional matter.

Mr. Ostrin: I submit that it has relevance in connection with labor operations in New York.

Mr. McAllister: I confined my direct examination to basic facts.

The Court: I will sustain the objection.

Mr. Ostrin: May I have this marked for identification, please?

(Defendant's Exhibit A marked for Identification.)

Q. I show you Defendants' Exhibit A for Identification and ask you whether that is the official letterhead of Incres Line at 39 Broadway address?

A. Yes, this is a photostatic copy of the stationery used at the office.

Mr. Ostrin: I offer it in evidence just for the limited purpose at this time of showing the stationery used by Incres Line.

With all due respect to your Honor, I don't think your Honor can read that.

Mr. McAllister: Your Honor, we have no objection. It is very clear that this corporation named here is not the plaintiff corporation, it is the Incres Line Agency, Incorporated.

Mr. Ostrin: It speaks for itself.

The Court: Mark it in evidence.

(Defendant's Exhibit A received for Identification.)

[fol. 109] Mr. Ostrin: May I read the caption into the record, your Honor?

The Court: Yes.

Mr. Ostrin: The letterhead reads as follows: "Ineres Line."

Directly under that: "Ineres Steamship Company, Ltd."

Directly under that: "Ineres Line Agency, Inc."

Directly under that: "General Agents."

Directly under that: "39 Broadway, New York 6, New York".

In the upper right-hand corner: "Cable Address: Ineresline."

Q. Mr. Berlingeri, I believe you testify that Agency, Ineres Line Agency, Inc., takes care of provisioning the vessels, is that right?

A. Yes.

Q. What does that mean, "provisioning the vessel."

A. From toilet paper to fuel.

Q. And in between is food, right?

A. Well, there are many things in between. That is the reason I went from one extreme to the other.

Q. What else does Ineres Line Agency, Inc. do in connection with these two vessels?

A. As I said before, the usual work involved with any agency.

Q. Rather than tell us the usual work, why don't you tell us specifically what it does aside from provisioning the vessel?

A. It may make arrangements for arrival and departure, checking the passengers on departure, providing landing arrangements on arrival booking.

Q. It takes care of all the passenger booking?

A. Yes, keeping books.

[fol. 110] Q. Then am I correct in understanding—

A. Advertising campaign.

The Court: The crew of the *Nassau* and the *Victoria*, where were they hired?

Q. The ship files a requisition with the Agency and then the Agency follows through, is that right?

A. Yes.

Q. Does that also apply to the fueling of the vessel?

A. Fueling?

Q. Fueling.

A. Cosmopolitan takes care of it.

Q. Does Cosmopolitan deal with the Agency?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. And the Agency is engaged in these operations on behalf of Incres Steamship Company, or Incres Line, is that right?

A. When you said "Agency," you mean Incres Agency?

Q. Yes. It is doing all these things in behalf of Incres Line, is that right?

A. Yes.

Q. And in that connection there are occasions when Mr. Wolfson will take orders from you, is that right?

A. Yes.

Q. You know, do you not, that the Incres Line Agency, Incorporated, is a New York corporation; is that right?

A. Yes.

[fol. 113] Q. How long have you been residing in New York City, Mr. Berlingeri?

A. '58.

Q. Since 1958?

A. Yes.

Q. Do you know who the officers of Incres Line Agency are?

The Court: Inc.?

Mr. Ostrin: Yes.

A. Yes. One of them is Mr. Frank Barnett.

Q. Is that the same Barnett who is in London?

A. Yes.

Q. And he is an officer?

A. I am sorry, you said of Incres Steamship?

Q. I am asking for the officers of Incres Agency.

A. Oh, I am sorry. Mr. Wolfson, Mr. Gordon, Mr. Mohl, Mr. Grey, and Mr. Young, and myself.

Q. You are also an officer of the Agency?
A. Yes.
Q. And what office do you hold at the Agency?
A. Just officer. I don't have any other.
Q. Are you also a director of the Agency?
A. A director.
Q. And a member of the board of directors of the Agency, is that right?
A. Yes.
Q. Do you know who the other members of the board of directors are at the Agency?
A. Mr. Wolfson, Mr. Jordon, Mr. Mohl, and myself.
Q. Do you get paid as an officer of the Agency?
A. No.
Q. Do you get paid as an officer of Ineres Steamship Company?
A. Yes.
Q. Who are the other officers, again, of Ineres Steamship Company, Ltd. besides yourself?
A. Mr. Barnett as secretary. Now I don't remember the names.
[fol. 114] Q. Do you ever attend meetings in England?
A. Sometimes.
Q. With Mr. Barnett?
A. Yes.
Q. And at these meetings you discuss the operations of the Line and the vessels, is that right?
A. Yes.
Q. Then you take back those things and you discuss them here in New York with the Agency; do you?
A. If I think it is necessary.
Q. Then you do, is that right?
A. Yes.
Q. Do you know who the members of the board of directors of Ineres Steamship Company, Ltd. are? Are they the same as the officers?
A. Yes, sir.
Q. In other words, the same people who are officers are members of the board of directors?
A. Yes.

Q. And you are both an officer and member of the board of directors of Incres Steamship Company, Ltd., is that right?

A. Right.

Q. And you are an officer and a member of the board of directors of Incres Line Agency, is that right?

A. Right.

Mr. Ostrin: That is all.

Redirect examination.

By Mr. McAllister:

Q. Mr. Berlingeri, you testified that on occasion in response to his Honor's questions it is necessary to replace members of the crew, and you testified they came in by air or by water?

A. Yes.

Q. Where do these replacements come from?

A. Italy.

Q. Are these Italian seamen?

A. Yes.

Q. Are all of the seamen on the *Nassau* and *Victoria* Italians?

A. All with the exception, for instance, of a nurse on [fol. 115] board the *Nassau* who is from Switzerland and a nurse on board the *Victoria* who was—she resigned recently—who was British.

Q. In response to a question, you spoke about having an agent in Nassau.

What are the duties of the agent, Incres Steamship Ltd. in Nassau?

A. The same as Incres Agency here in New York.

Q. You referred to Cosmopolitan Shipping Company in your testimony?

A. Yes.

Q. What does that corporation do for your steamship line?

A. For the steamship line?

Q. Yes.

A. The accounting, and for the Ineres Agency, the operation of the ships; practically, they are the people who are having the file of the tugboats. In other words, we are using the port captain of the Cosmopolitan.

Mr. McAllister: No further questions.
Mr. Ostrin: May I ask some questions?
The Court: Yes.

Recross examination.

By Mr. Ostrin:

Q. Where does Cosmopolitan have its office?
A. 42 Broadway.
Q. Now I wonder whether you could explain this for us, Mr. Berlingeri. I picked up the telephone book looking for the address and telephone number of Ineres Line, and I found the address 42 Broadway.

Mr. McAllister: Your Honor, I object to this. This is not a question. Mr. Ostrin is simply testifying here.
Mr. Ostrin: It is a question.

[fol. 116] Q. I found the address 42 Broadway.

The Court: I will allow it.

Q. Does Ineres Line have an office at 42 Broadway also?
A. It had an office.
Q. It had an office or it has one?
A. In 42 Broadway?
Q. Yes.
A. It has an office.
Q. It has an office now?
A. In 42 Broadway.
Q. And is that Ineres Steamship Ltd. that has an office there or is it the agency?
A. It is the agency.
Q. So am I correct in understanding that the agency has an office both at 39 Broadway and at 42 Broadway? Is that right?
A. Not exactly, no.
Q. Will you explain it?
A. Yes.

A. Yes, they are.
Q. And they are Italian citizens?
A. Yes, they are.
Q. And replacements for them are—
A. All the crew are Italian.
Q. With the exception?
A. With the exception of the nurse, who is from Switzerland, and one waiter who is from Spain.
Q. Captain, what is the language of command of the SS. *Nassau*?
A. Italian.

Mr. Stratton: I have no further questions.

[fol. 119] Cross examination.

By Mr. Ostrin:

Q. Who are the tourists, the people who ride the ships? Are they Italians or Liberians in the main?
A. What do you say?
Q. The people, the passengers on your ship, are they mainly Liberians or Italians?
A. Mainly Americans.
Q. Has your ship ever been to Liberia?
A. Never.
Q. How often does your ship go to England?
A. Since I am in the command of the *Nassau*, it has never gone to England.
Q. It never goes to England?
A. No.
Q. How often does it go to Italy?
A. Once a year generally.
Q. About how many round trips does your ship make between New York and the Caribbean Islands during the year?
A. About thirty.
Q. Ten in a year?
A. About thirty.
Q. Thirty?
A. Yes.
Q. And this is the regular run, isn't it?

A. Yes; generally every week.

Q. Do you know Mr. Wolfson?

A. Of course I do.

Q. Do you deal with Mr. Wolfson in connection with your work?

A. Yes.

Q. In what way?

A. Well, as soon as I arrive generally he comes on board. I have a speech with him and I ask him what I need about supplies, about fuel oil, about food, about everything.

Q. Do you talk to him about the behavior of the crew at any time?

A. Well, generally not, you see. If there is something very, very important, I tell him, but otherwise—

Q. When you say very important, what do you mean?

A. Well, if there is, for instance, some work to disembark, [fol. 120] I do already, because it is my job, but if today, if there is something very important, for instance, in discipline, I inform him.

Q. That you disciplined somebody; is that right?

A. Yes.

Q. Do you ever deal with Mr. Berlingeri?

A. If he is on board, yes.

Q And do you ever tell him about disciplinary action that you may have taken?

A. No, I have not, but if he is on board, of course I do.

Q. If he is aboard, then you will tell him?

A. Yes.

Q. That you may have taken disciplinary action?

A. Yes, yes.

Q. So is it correct to say that sometimes you will report to Mr. Wolfson about disciplinary action that you took?

A. Yes.

Q. And sometimes you will report to Mr. Berlingeri; is that right?

A. Yes.

Q. And it all depends upon whom you see first?

A. Well, if they come on board I speak with them, but, of course, I make a report to the Ineres Line.

Q. To whom do you make the report, to the agency?

A. Yes.

The Witness: In Italy.

The Court: In Italy?

The Witness: Yes.

The Court: Was any agreement signed between the company and the crew as to what their wages would be?

The Witness: Yes, a written contract.

The Court: Made in Italy?

The Witness: They signed the contract in Italy.

The Court: For both of them?

The Witness: For both vessels. Excuse me. For the *Nassau*, yes. For the *Victoria*, they have been engaged in Italy and they signed the contract in Italy to be taken on the ship in Rotterdam or in Havre.

The Court: Do you have that contract?

The Witness: Not with me here.

The Court: Do you know whether it contained a provision with respect to wages?

The Witness: They are all listed. the wages, for the various men.

The Court: Does it also contain provision for the duration of the voyage?

The Witness: Yes, the pay for the duration of a season and when the ship is leaving. We have the wages for the whole season.

Q. From time to time does the company hire replacements for the vessels?

A. Yes.

[fol. 111] Q. And is it a fact that those replacements are flown to the United States?

A. If they are urgent, otherwise they can come by ship.

Q. Or by ship?

A. They may fly or by ship.

Q. When Incres Line sells these passengers tickets, engages booking, does it account to Incres Steamship Company, Ltd.?

A. To Incres Line?

Q. Yes.

A. Yes.

Q. And who arranges for repairs to the vessel in the event repairs are needed here in New York?

A. The Technical Department.

Q. Of what company?

A. Up to last year it was Cosmopolitan Shipping Company.

Q. Who orders the repairs? Does the Agency order the repairs?

A. What do you mean, who signs the bill for the repairs?

Q. Yes, who orders it? Supposing a repair is necessary. The vessel is here in New York. Who authorizes that the repair be done?

A. Mr. Wolfson.

Q. Mr. Wolfson?

A. Or after discussion with me when I am here. I am not here all the time. I can authorize the repair.

Q. Do I understand that when you are here, you would authorize it, and if you are not here he would do it on his own, is that right?

A. He may make a telephone call or contact other parties by wire or any other means of communication because sometimes you need some technical advice.

Q. Do I take it then that he reports to you?

A. Not necessarily to me. Maybe he talks to a technician.

Q. I don't think you understand my use of the word "report." Does he consider you to be his superior?

A. In a way.

[fol. 112] Q. In what way, sir?

A. Well, as, for instance, our agent in Nassau can consider me his superior just because the company gives the business to the Agency. It is the president.

Q. Am I correct in saying, and is this correct, that when repairs are necessary to the vessel Mr. Wolfson will order them; is that right?

A. Yes.

Q. He determines what provisions go aboard the ship, is that right?

A. Well, let us say the ship makes a requisition.

Q. Who does it make the requisition from? From Mr. Wolfson?

A. No. Our Agency here receives the requisition from the department on the ship and they pass it through.

Q. The agency does have an office at 42 Broadway?

A. The address and the office of the agency is at 39 Broadway and 42 Broadway we still have, because we got—the lease has not expired yet, one or two rooms.

Q. Is that where Cosmopolitan has its office or just in the same building? Is that right?

A. In the same building. In other words, if I understood correctly your question, these two rooms are not in the office of Cosmopolitan. They are separate.

Q. But they are in the same building?

A. The same building only.

Q. And Cosmopolitan handles all of the operation for the agency?

A. For the port captain.

Q. Cosmopolitan is the port captain?

A. No.

Q. Or handles the operations of the vessel with the port captain, is that it?

A. We are using the port captain of Cosmopolitan.

[fol. 117] Q. You use their port captain?

A. Their port captain.

Mr. Ostrin: All right, that is all.

The Court: That is all, sir.

(Witness excused.)

The Court: We will take a recess until tomorrow.

Mr. McAllister: We have just one more witness, your Honor.

The Court: All right.

Mr. McAllister: I will ask Mr. Stratton to examine him, if he will, to make it more expeditious, I am sure, because he is familiar with him.

The Court: Call your witness.

Mr. Stratton: Captain Vagliasindi.

PAOLO VAGLIASINDI, residing on the Steamship *Nassau*, called as a witness, having been duly sworn, testified as follows:

Direct examination.

By Mr. Stratton:

Q. Captain Vagliasindi, what ship do you command, sir?
A. Steamship *Nassau*.
Q. Where is it docked?
A. Pier 42, North River.
Q. In Manhattan, New York City?
A. Yes, foot of Morton Street.
Q. How long has the *Nassau* been there, Captain?
A. Since Friday morning.

Mr. Ostrin: I object to any questions along this line, your Honor.

[fol. 118] Mr. Stratton: Just establishing jurisdiction, your Honor.

Mr. Ostrin: It has nothing to do with jurisdiction.

The Court: Go ahead, I will allow it.

Q. Captain, what flag does the *Nassau* fly?
A. The Liberian flag.
Q. Do you know what flag the *Victoria* flies?
A. Yes; Liberian, too.
Q. Captain, where were the articles of the *Nassau* opened?
A. In Genoa.
Q. When was that, Captain?
A. November 27th, if I am exact; maybe the 27th or the 28th, I don't know, is the date of the articles.
Q. If 1959?
A. Yes.
Q. Where was the crew recruited, Captain?
A. In Genoa.
Q. Did you hear the testimony of Mr. Berlingeri?
A. Yes, I did; not so well, because from there it is impossible to understand perfectly what they say here.
Q. Without going into details, is the great majority of your crew of Italian birth?

Q. And you also make a report to the steamship company?

A. The agency.

Q. You make a report to the agency?

A. Yes.

Mr. Ostrin: May I call for the production of the reports.

Q. Are these regular reports?

A. What?

Q. Are these regular reports that you make?

A. Yes, every week I make a report.

Mr. Ostrin: I would like to call for the production of the reports of the master to the agency.

[fol. 121] Mr. Stratton: Your Honor, there is no relevance to those reports to this hearing at this time. Perhaps when we get to another hearing for broader purposes those reports will become relevant.

Mr. Ostrin: I think they are, your Honor. I think the record so far shows a situation of interlocking directorates. That is clear. It shows that both the agency as well as the company receive reports from the master concerning disciplining of the crew, and I submit on the basis of some of the cases that the Board has had occasion to pass upon on jurisdiction, that interlocking directorates become material and important and that the handling of labor relations becomes material and important as well as the operations of the vessel.

Now, it seems to me, at least at this point in the proceedings, that there is a real relevancy in this thing, and I think on the basis of the record so far that there is a direct and intimate and interlocking relationship between the Ineres Line Agency, Inc., a New York corporation, and Ineres Steamship Company, Ltd.

I respectfully submit that we are entitled to examine the reports that the master makes with the agency.

The Court: Objection sustained; exception.

Mr. Ostrin: I have no further questions.

Mr. Stratton: Your Honor, just one question.

The Court: Yes.

[fol. 122] Redirect examination.

By Mr. Stratton:

Q. Captain, for what purposes does the ship go back to Italy?

A. For leave for the crew and for some repairs, generally.

The Court: What about the crew?

The Witness: Leave for the crew.

Mr. Stratton: Thank you, Captain.

Mr. Ostrin: Is that all for today?

Mr. McAllister: That is all we have limited to the facts that we believe to be important for the Court to consider in connection with the jurisdiction.

Mr. Ostrin: Your Honor, may I, in the interest of my zeal in this case—and I am not going to argue anything—but only because our brief does not contain a few cases which are referred to in our argument, may I ask your Honor to please look at the Brown Company case, 109 NLRB.

The Court: You gave me that.

Mr. Ostrin: 173.

The Court: Yes.

Mr. Ostrin: Where the Board held that the fact a majority of the employes involved were non-resident aliens did not divest it of jurisdiction; and may I also, although we cite the Afran case, recite it for one purpose and not for another. May I ask your Honor to look at the Afran case and the decision by Judge Van Pelt Bryan who held that because there is a serious doubt on the question of jurisdiction he would not issue a preliminary injunction.

We will send a copy of the decision. The case is cited.

[fol. 123] Colloquy

The Court: Do you have any testimony to offer on this question?

Mr. Ostrin: No, we don't have anything on this.

May I also point this out, your Honor, that there has been testimony adduced from this witness that the crew members are hired in Italy, and that articles are signed in Italy. In the United Fruit case where the Board took juris-

diction, all articles were signed in Honduras and a preponderate majority of the crew members were Hondurans and nevertheless the Board took jurisdiction and took the case and is considering a decision.

Again I say there can be no jurisdiction.

Mr. McAllister: May it please the Court—

The Court: Pardon me. If you gentlemen will come in tomorrow before we call the calendar at ten o'clock, I think I will decide this question of jurisdiction and then you can proceed from that point.

Mr. McAllister: Very well. The only statement I would like to make, your Honor, is that some of the statements made by my opponent with respect to the Labor Board cases are so erroneous that I would like to have some way of meeting them.

I received his brief this morning in court. For example, the reference here to the United Fruit Company case, as I understood it, was to the effect that the Board had taken jurisdiction. It has not taken jurisdiction.

Mr. Ostrin: I don't want to mislead the Court.

[fol. 124] Mr. McAllister: I point that out to the Court.

Mr. Ostrin: It is certainly not my intention, your Honor, to mislead the Court. This is what happened with United Fruit.

A petition was filed for certification as representatives. The company moved to dismiss on substantially the same arguments that were raised by Mr. McAllister. The Board said, as it did ultimately in Eastern Shipping, we will not dismiss. There are serious questions of fact and law. We will hold a hearing.

Now, this, in a sense, is what the Board did in United Fruit. This is what it did in Eastern Shipping. This is what it is mandated to do under the Act, and this is what is referred to by the Garmon case where it says if there is an arguable question it must first go to the Board.

The Court: You have repeated that so often, counsel, that it has made an impression on me.

Mr. Ostrin: If it has, then I am satisfied, your Honor.

Are we to come in tomorrow, Judge?

The Court: Tomorrow morning at ten o'clock.

Mr. Stratton: Will your Honor instruct the witnesses present in the courtroom that the subpoenas are to be adjourned until tomorrow at ten o'clock.

Mr. Ostrin: Assuming your Honor decides that there is no jurisdiction, then that is the end of the case.

[fol. 125] The Court: You will either be directed to the Appellate Division, or you, depending upon how I decide the jurisdictional question and leave the other matter open.

Mr. McAllister: Your Honor, if you decide the Court has jurisdiction, we wish to proceed with the hearing.

Mr. Ostrin: We don't know yet, Judge. We want to think about that, and we are not going to take too long about it.

The Court: I still think it is sensible to get rid of the whole thing and have them decide it up there once and for all rather than to decide one issue and have them dispose of it and maybe have to come back here.

Mr. McAllister: We have made so much progress this afternoon.

Mr. Ostrin: We sure have.

Mr. McAllister: I think it is an indication of how we can go ahead.

The Court: All right.

(Whereupon, an adjournment was taken to May 19th, 1960, at ten o'clock a. m.)

Thursday, 11 a. m., May 19, 1960

(Same appearances.)

The Court: First, gentlemen, allow me to apologize for the quality or should I say the lack of quality of my voice. I have been suffering with a persistent hoarseness which my doctor tells me is not of any moment but at the same [fol. 126] time it is disagreeable, and I hope you will bear with me in the course of my rather brief remarks in disposing of this phase of the case, this morning.

I have given careful consideration to the arguments made by both sides, as well as to the testimony which was offered here yesterday.

Can you gentlemen hear me?

Mr. Ostrin: Yes.
Mr. McAllister: Oh, yes.

ORAL DECISION DENYING DEFENDANTS' CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION

The Court: And I must confess that, while the matter is not free from doubt, I have come to the conclusion that jurisdiction resides in the State court. I have come to that conclusion on the basis of my very careful study last night of the principal authorities cited to the Court, namely Benz *vs.* Compania etc., reported in 353 U. S. 138, and Marine Cooks and Stewards *vs.* Panama Steamship Company, a very recent case decided on April 18, 1960, reported in the Supreme Court Reporter, Volume 80, No. 12, at page 779, *et seq.*

Mr. Justice Clark in the Benz case was very careful to note that: "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Con- [fol. 127] gress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill."

Then, Mr. Justice Clark stated: "The problem presented is not a new one to the Congress." He then continues to consider the Seamen's Act of March 4, 1915, and draws a distinction between that Act and the one under consideration now, to show that where Congress intended to speak in regard to seamen's affairs, particularly foreign nationals, it did so in explicit language in the Seamen's Act of March 4, 1915, but was completely silent in the Act which is involved in this case.

I do not think it is necessary for me to recite the facts in the Benz case as it is clearly in the minds of both of the respective parties here. And that case would seem to be

squarely on all fours with the instant case, and would leave no doubt in the Court's mind but for the holding and some of the language in the Marine Cooks and Stewards case, alluded to before. If this case were to be decided solely upon the decision in the Benz case, the Court would be left with no alternative but to hold that the State court has jurisdiction in the instant case, as Congress has not undertaken to speak in relation to ships under foreign register involving seamen of foreign origin and nationals of a foreign jurisdiction.

We come now, before I allude to the facts here, to the [fol. 128] holding in the Marine Cooks and Stewards case. There Mr. Justice Black undertook to distinguish the two cases, and he said as follows: "The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a Federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict Federal court jurisdiction in controversies involving labor disputes. Nothing was said or intimated in Benz that would justify an inference that because a State court has jurisdiction to award damages in labor disputes the United States courts have the power to issue injunctions in like situations."

In a footnote Mr. Justice Black said: "Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on the behalf of the foreign employees as in Benz."

I think that distinction is persuasive on the contested issue of jurisdiction in this case.

Then Mr. Justice Black said: "There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under State or Federal law. All we decide is that the Norris-LaGuardia Act deprives the [fol. 129] United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now taking up the facts in the instant case: We find in the record, without dispute, that the *Nassau* and *Victoria*

were completely foreign owned, dominated and controlled; that the seamen on those ships were foreign nationals; that the officers of the Ineres Steamship Company, Ltd. were foreign nationals, although from time to time some of them were temporarily resident in this State.

Under these circumstances it would appear to me that the picketing in this case was not for the purpose of protecting the economic interests or the jobs of American seamen but for the purpose of protecting or acting in sympathy with the foreign national seamen aboard the *Victoria* and the *Nassau;* and that, therefore, would bring it squarely within the holding in the Benz case as pointed out by Mr. Justice Black in the succeeding case—the name always escapes me—in the Marine Cooks and Stewards case, wherein he undertook to draw a distinction between the holding in the Benz case and the holding in the Marine Cooks and Stewards case.

On the authority of these two cases and the language there employed and the reasoning, as well as on the basis of the undisputed facts in the instant case, the Court is constrained to reach the conclusion, as if announced at the outset, that the State court in the circumstances here pres- [fol. 130] ent has jurisdiction. And therefore the motion by the moving defendants to oust the Court of jurisdiction is denied, with an exception to the defendants.

Now, gentlemen, what is your pleasure?

Mr. Ostrin: May I—I don't suppose—

Mr. McAllister: May we proceed with our hearing on the temporary restraining order, your Honor, which is returnable. We have our witnesses here and we are prepared to go forward.

The Court: All right. • • •

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[fol. 138] Afternoon Session

2:00 o'clock p. m.

May 19, 1960

Mr. Stanton: Your Honor, before we call the first witness we would like to have the material that was introduced in evidence on the hearing yesterday considered on this matter as well, also the affidavits filed, so that we don't have to duplicate that record.

The Court: You mean the testimony taken?

Mr. Stanton: Yes, sir, I do.

The Court: That request is granted.

Stefan Cattaneo, residing at 400 East 56th Street, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stanton:

Q. Mr. Cattaneo, by whom are you employed?

A. The Incres Steamship Company.

Q. And what are your duties?

A. I am the technical inspector of Incres Steamship Company.

[fol. 139] Q. Mr. Cattaneo, were you aboard the M/S *Victoria* Tuesday, May 17, 1960?

A. Yes, Tuesday.

Q. And were the passengers aboard the "*Victoria*" at that time?

A. Yes.

Q. How many times did you go aboard that vessel?

A. Tuesday at 2:00 o'clock?

Q. At 2:00 o'clock.

A. 15 or 20, I don't know exactly.

Q. Did more come aboard during the course of the afternoon?

A. In the afternoon, yes, after 2:00 o'clock.

Q. Was the vessel scheduled to sail that night?
A. Yes, in the afternoon.
Q. About what time?
A. Between 4:00 and 6:00 o'clock, in between.
Q. Did you see a small launch approach the M/S *Victoria* that afternoon?
A. Yes.
Q. At what time was that?
A. About two and a half.

The Court: 2:30?
The Witness: 2:30, that is correct, about.

Q. What were the markings on that launch?
A. The markings were UMD 2.
Q. And what did that launch do?
A. It is difficult to speak English.
Q. Go as far as you can.
A. I'll try. The launch was off the boat with a loud speaker and it speak Italian, and at the start he say: "You have member of the crew of the Steamship *Nassau* and we speak for the International Union."
Q. For the who?

The Court: International Union?
The Witness: International Union. And he speak Italian, [fol. 140] he have a crew member from the *Victoria*. He say: "You may—what you do—
Mr. Stanton: Maybe it would be easier if we use the interpreter.
The Court: Yes.
The Witness: I can't speak.
The Court: I don't find fault with you.
Mr. Ostrin: May we have an official interpreter, please?
The Court: We have an interpreter here. We have an Italian interpreter in the building, unless he or she may be occupied.
Mr. Stanton: Then may we proceed at this time in English as long as we can?
The Court: Do the best you can.
Repeat the question, please.

Q. What was said by the passengers aboard the U. M. D. 2, the people in the U. M. D. 2, over the loud speaker.

A. He was speaking in Italian and he say, "We have the group of the *Nassau* and we speak for the International Union, and you do what you like. First we say that you must go out."

Mr. Ostrin: May we wait for the interpreter?

The Court: What did they say?

The Witness: "We have crew of the *Nassau*."

Mr. Ostrin: May it please the Court, it is obvious this witness has difficulty with the English language. May we wait until the interpreter comes down and then he can say what the passengers said in Italian and we will get the translation.

[fol. 141] Mr. Stanton: May we have this picture marked for identification, your Honor?

(Photograph marked Plaintiff's Exhibit 3 for identification.)

Mr. Stanton: May I proceed to get the identification of this picture, your Honor.

The Court: The interpreter is here.

(The direct examination thereupon continued through the Official Interpreter, as follows):

Q. Mr. Cattaneo, I believe you testified that you heard the men aboard the U. M. D. 2 calling to the ship, the MS. *Victoria*. What did those men say?

A. First of all I want to be clear on this point, that I did not write down anything. I did not write. Maybe what I am saying, the words I am saying I am not sure whether they are the exact words I heard, but the meaning is that, the meaning of the words, the exact meaning:

"We are part of the crew of the *Nassau* and we are talking in the name of the International Syndicate. You do whatever you like to do, but we tell you to get down, to come down as soon as possible, and if they do not let you come down, we will tell you and show you how to come down. Once we have the law you will find how to go around it, to deceive it. You tell that you are sick, and report that

you are sick, and tell them that you have a bellyache. We will send you a doctor who will see to it that you will get down on the ground, on shore, and we will send you a boat to get you, and each one of you raise his hand, whichever is in accord with this," and at the same time they were [fol. 142] embarking people, getting passengers, people aboard. They were taking passengers aboard with the baggage and turning to the people who were taking care of the baggage, the people who carried the baggage: "Do not boycott us."

Then they read a letter written by President Berlingeri, who wrote to the crew of the *Nassau*, and they read this letter.

After reading the letter, they said. "These terms we could have accepted them a week ago, but now it is too late. And then what else?"

All this they said in the Italian language. And then at one point they switched to English and then they were taking passengers aboard with the boats, and then the loud speaker, the U. M. D. 2, with a loud speaker, turned toward the men in charge of the boat, this boat that was taking on passengers, and in the English language said, "Because the boat is going back to the pier to take on more passengers." It was empty, without passengers. This was said in English: "Your behavior, your act, is illegal. Come back."

Then at the end after this: "Let's go on shore and make a telephone call and we will come back. You wait for us because we will come back."

Q. I show you Plaintiff's Exhibit 3 for identification (handing to witness). Is that the U. M. D. 2?

A. Yes.

Mr. Stanton: I offer Plaintiff's Exhibit 3 for identification in evidence.

The Court: Any objection?

Mr. Ostrin: May I ask a question on the voir dire?

The Court: Yes.

[fol. 143] Mr. Ostrin: When you saw this boat, which is in evidence as Plaintiff's Exhibit 3 for Identification, was the man standing just where he is standing here?

The Witness: Well, the boat was there quite a while so that the man moved from one part to another. Except in instances he was just like that.

Mr. Ostrin: Is this a picture of the man that you saw?

The Witness: Well, I saw the boat from a distance. Yes, it is.

Mr. Ostrin: That is the man that you saw?

The Witness: Yes. I saw him from a distance.

Mr. Ostrin: And this is the man that you saw?

The Witness: Yes. At that distance, yes.

The Court: Did you see a man or is this the man you recognize?

The Witness: Well, I saw him from a distance, I didn't see from near, and from the distance I could see that this was the man. It seems to me that he is the man because I recognize from the clothing he had on.

Mr. Ostrin: How many men did you see on the boat?

Mr. Stanton: That is not proper on the identification of this picture.

The Court: I don't think it is.

Mr. Ostrin: The question is whether this is how he saw the boat. I don't know whether this picture was taken at [fol. 144] that time or this merely represents a picture of a boat that he had seen.

The Court: What do you say?

Mr. Stanton: It was taken at that time, your Honor.

The Court: The objection is sustained. I don't think that is proper on the voir dire, counsel. He identifies that as the boat. I think that is sufficient.

Mr. Ostrin: I submit to your Honor that there has been no proper foundation laid for the introduction of this picture at this time.

The Court: Let me have that picture.

Mr. Ostrin: Unless this witness took the picture.

The Court: Do you recognize this boat (indicating Plaintiff's Exhibit 3 for Identification)?

The Witness: Yes, sir.

The Court: Is this the boat that approached the *Victoria*?

The Witness: Yes, sir.

The Court: Were there some people on the boat at the time that it approached the *Victoria*?

The Witness: Yes, sir.
The Court: I will receive it, with an exception.

(Photograph previously marked Plaintiff's Exhibit 3 for Identification marked in evidence.)

By Mr. Stanton:

Q. Mr. Cattaneo, do you see any of the occupants of the boat that afternoon in this court room?
[fol. 145] A. I cannot be sure because of the distance I was. I cannot be sure.
Q. Did the crew then refuse to continue taking passengers aboard the "*Victoria*"?

Mr. Ostrin: Objection.
The Court: Then what occurred?
The Witness: Well, they continued to embark passengers and part of the crew took the baggage of the passengers but another part of the crew was waiting to get ready to get down from the gangway to go on the boat, ready to go on the boat.
Mr. Ostrin: Objection. I move that the last part be stricken, they were waiting, too.
The Court: What were they doing?
The Witness: They were near the gangway, on the gangway, on the steps, waiting to get down.
Mr. Ostrin: Objection. I move that "waiting" be stricken.
The Court: All right, strike it out.

Q. Did part of the crew refuse to obey orders of the officers?

Mr. Ostrin: Objection.
The Court: Sustained.
Were any of the officers of the "*Victoria*" giving any instructions to the crew?
The Witness: What instruction do you mean?
The Court: At that time you say they weren't doing anything, they were at the gang plank?
The Witness: I cannot answer you exactly but I know [fol. 146] that some of the officers made some of people waiting to get down to get away from there.
Mr. Ostrin: Objection.

The Witness: (Continuing) Not for the passengers. In order to be able to get the passengers aboard.

Mr. Ostrin: I move to strike out the answer.

The Court: I will allow it.

Mr. Ostrin: Unless we know the basis for his knowledge what the officers intended to do, this merely calls for the operation of his mind. We don't have any testimony as to what he saw.

The Witness: I was on the boat deck and I was looking outside of the boat and this ladder, it is outside.

The Court: Ladder?

The Witness: Ladder protrudes outside and from above I could see down.

The Court: What did you see?

The Witness: I first saw part of the crew standing ready to get down.

Mr. Ostrin: Objection to the use of the word "ready."

The Court: Sustained. Where were they standing?

The Witness: On the ladder. And then after, in a second moment they were made to get out of there.

Mr. Ostrin: Objection.

The Witness: (Continuing) So that the passengers would be able to embark.

The Court: Sustained.

[fol. 147] Did you hear or see the officers do anything with respect to these crew men that you said were standing there?

The Witness: No, I did not see, I did not hear any of them, but I know that they said these people to get away from there.

Mr. Ostrin: I move that the answer be stricken.

The Court: We don't have a jury here.

The Witness: In order for the passengers to come aboard, to let the passengers come.

The Court: If you did not hear them or see them how did you know what they were saying?

The Witness: Because the first officer was next to me.

The Court: And what did he say?

The Witness: He said to leave the ladder so that the passengers would be able to come up.

The Court: You heard an officer say that?

The Witness: Yes.

The Court: To whom was he talking?

The Witness: That is the Second Officer, the Second Mate.

Mr. Ostrin: I am going to move to strike what he concluded. All his remarks were conclusory. He has clearly testified he neither saw nor heard anything except what one officer said to another.

The Court: What ultimately happened? What finally happened?

The Witness: Then these people got away from there. [fol. 148] The Court: Which people?

The Witness: Those people who were standing and then a boat with passengers came near and so the passengers came aboard. At the same time—I am referring to what I said before—when I was talking about the loud speaker saying words in English it was talking to the empty boat that was going away in order to give room to the new boat, the other boat full of passengers, and this is the moment I am referring to when part of the crew was standing on the ladder.

Q. Did the *"Victoria"* sail that night, Mr. Cattaneo?

A. No.

Q. Where is the *"Victoria"* now?

A. It is at quarantine. She is at anchor in quarantine.

Q. Is that where it was at the time of this incident?

A. Yes, sir.

Q. Where are the passengers?

A. Now, you mean?

Q. Yes.

A. They embarked and they went on board. They did embark.

Mr. Stanton: I have no further questions.

Cross examination (Through the Official Interpreter).

By Mr. Ostrin:

Q. Mr. Cattaneo, you work for the Incres Steamship Company?

A. Yes, sir.

Q. That is the Ineres Steamship Company, Ltd.?

A. Yes, sir.

Q. And what job do you have there?

A. I am a technical inspector.

[fol. 149] Q. And what do you do as a technical inspector?

A. I was in charge of the alteration work of the "*Victoria*", that work that was made last year in Holland, and we were nine months in Rotterdam.

Q. Do you have an office in New York?

A. Well, I am here just for this *Victoria* to guarantee that everything is all right, to guarantee the work done in the Navy Yard. There is a year's guarantee for a year's work done on the ship.

Q. That is for the work done on the ship, is that right?

A. Yes.

Q. Do you know a Mr. Wolfson?

Mr. Stanton: Objected to, not proper cross examination, your Honor.

The Court: I will allow it.

A. Yes.

Q. While the work that you are supposed to do for the Ineres Steamship Company have you had any dealings or conversations with Mr. Wolfson?

A. You mean where, in Rotterdam?

Q. Here in New York or in Rotterdam?

A. Well, here in New York when I have some problem, technical problem,—when I need some assistance from the Agency I apply myself to Mr. Wolfson.

Q. Is that assistance in connection with the work done on the ship, the repairs and the improvements made on the ship?

A. Well, that is the normal assistance of an Agency when an inspector checks a boat and the installations and needs assistance, normal assistance, the usual assistance.

Q. Did he check the installations with you? Did he look them over with you?

A. What do you mean, check?

[fol. 150] Q. Did he look it over with you? Did he inspect them?

A. Which installation do you mean?

Q. All of the improvements that were being made on the *Victoria?*

A. No.

Q. Did you work with Mr. Wolfson in Rotterdam?

A. No.

Q. How often do you see Mr. Wolfson?

A. Well, it depends.

Q. How often have you seen him in the last month?

A. On working day very often because there is some time for a period I am on board and for the next period I am on shore. When I am on shore I have a desk in the Agency office of the Ineres and when I work in the office, of course, I see Mr. Wolfson.

Q. And you have a desk in the office of the Agency?

Mr. Stanton: Your Honor, I am going to move again to cut off this line of examination.

The Court: Yes, I think we are getting back to the other issue of jurisdiction. I think I should have to make this shorter. In any event, it doesn't seem to be germane to the issue.

Mr. Ostrin: I submit, your Honor, and I submit most strongly that it is germane. It goes to the Marine Cooks and Stewards case on which your Honor relied so heavily, and it goes to the jurisdiction. Jurisdiction is always an issue. Jurisdiction is at all times an issue.

The Court: I have determined that already.

[fol. 151] Mr. Ostrin: But it is still at issue and it goes to the question of labor disputes, your Honor.

The Court: All right, just go right ahead but don't touch on that subject.

Mr. Ostrin: May I have an exception. I respectfully submit to your Honor while your Honor may have disposed of the issue of jurisdiction and we have consented to proceed with this action, while this is at the present time a hearing on the preliminary injunction the question of the jurisdiction of the Court may never be waived; the question of the jurisdiction of the Court is always at issue.

The Court: Go right ahead, will you, please?

Mr. Ostrin: May I have an exception.

The Court: Surely. Under the Civil Practice Act you have an exception without taking one.

Mr. Ostrin: May I also point out, your Honor, that we are dealing with the Association in this case between, ostensibly, an Italian owned corporation and an American Agency incorporated under the laws of the State of New York.

We are also dealing with employment relationships, and I respectfully submit to your Honor that in view of all of these issues that are involved, even on the issue of a temporary injunction, on the question of whether or not there is a labor dispute and whether this labor dispute is between employees and an American or a foreign owner, or operator, is most important.

[fol. 152] Now, it is patently clear from what we have adduced so far from this witness that he is employed by Ineres Steamship Company, Ltd., but that he takes his orders and directions and reports to the agency; that he has an office in the agency; that he works out of the agency. Now, this to my mind, your Honor, shows a clear and definite connection and association between an American Corporation and an Italian Corporation, both of whom together, jointly operate these vessels, so that we are now dealing with a wholly owned or wholly controlled foreign corporation.

The Court: So far the evidence has disclosed, and only disclosed, that it is a wholly owned corporation managed, dominated, and controlled by foreign nationals, and it is registered under a foreign flag. The seamen involved are seamen of a foreign nation. Now, that disposes of that issue.

Mr. Ostrin: I believe your Honor said in your opinion this morning there is no dispute between the parties as to whether this was a foreign owned corporation, and we have always disputed that. We disputed it yesterday and we dispute it now.

May I also point out, if your Honor please, that there is not a single allegation in this complaint or in the moving affidavits that this is a dominated and controlled foreign corporation or company.

The Court: Initially you disputed, as an adversary, as an attorney in the case. I am speaking from the standpoint [fol. 153] of the factual picture presentation. From that standpoint, there is no dispute.

Mr. Ostrin: On the basis there was clear and convincing testimony that you had an interlocking directorate between the American corporation and the foreign corporation, and that Mr. Berlingeri operated as an officer of both.

The Court: All right, counsel. As I said before, you will have to take it as I give it to you, and that is all you can do. Later you can correct me if I am in error. You can correct me in the Appellate Division.

Q. What time did you board the Victoria on Tuesday of this week?

A. I went on board at 8:00 o'clock, and I went back on shore at 11:00 o'clock and then I went back on board about 1:15 with the first passenger boat, and then I returned on shore about 3:00 A. M.

Q. Were all of the members of the crew of the Victoria aboard the vessel?

A. Maybe one or two people of the crew wasn't there. I think the crew was complete. Well, it was completed, because they had to leave.

Q. And was the crew doing its duty, performing its duties?

A. Yes, sir, at 2:00 o'clock.

Q. I think you said that about 2:30 in the afternoon of that day you saw the U. M. D. 2, is that right?

A. About. I didn't look at the watch.

Q. And where were you standing at that time?

A. About 2:30 I was in the office of the Chief Purser when I heard a loud speaker, which was not normal. I went out on the boat deck and I stayed there all the time.

[fol. 154] Q. Where is the boat deck in relation to the ship?

A. What do you mean, where?

Q. Have you got a picture of the ship here? You know where the boat deck is?

A. Yes.

Q. But maybe I don't know. Where is the boat deck on the ship?

A. I can make a sketch for you.

(Witness makes sketch.)

Mr. Ostrin: May I have this marked for identification, please?

(Defendant's Exhibit B marked for identification.)

The Witness: It is not an exact sketch. I just drew it by hand.

Q. As I understand it, Mr. Cattaneo, you were standing just where the arrow is, as you look to the left of the picture, is that right?

A. I don't know exactly where I was standing—I know where I was, but I wasn't standing all the time in one spot.

Q. Will you indicate by a little cross-mark just about where you were standing?

A. Here (indicating). But not all the time. Most of the time I was there.

Q. And were you standing alone?

A. No, there were other people there.

Q. Passengers?

A. No, not passengers.

Q. Were they members of the crew or were they officers?

A. The majority were officers, because in that boat you find the officers' quarters on the deck.

Q. How far away from where you were standing was the *U.M.D. 2*?

A. Well, the distance wasn't always the same.

[fol. 155] Q. What was its closest point to you?

A. I can't say exactly. I can say more or less, about.

Q. Was it further away than the end of the room is from you now?

A. Yes, farther away, more.

Q. Would you say three times as far?

A. About, yes. It is very hard to judge when you are at sea. I can only say about.

Q. Would you say it was about 300 feet?

A. I cannot say exactly, I can only say about.

Q. But you were not able to recognize the people who were on the boat, were you?

A. It was a distance that if I had seen a person, I wouldn't be a hundred per cent sure who that person was.

Q. So that you couldn't really recognize him, could you?

A. At that distance I could not recognize him. I could see whether it was a man or a woman.

Q. You could see whether they were men or women?

A. I recognize whether the man was about forty years of age or was a young man eighteen years of age.

Q. But you couldn't make out enough so that you could recognize that person?

A. I really did not pay attention, but I only could see the outline of the person.

Q. How many people were on this boat?

A. I cannot say exactly, because part of it was closed, but I saw two people for sure.

Q. Did you see at any time more than two?

A. I don't remember.

Q. How long were you observing this boat?

A. I didn't always look at this boat, but more or less I observed it during the time I was there.

[fol. 156] Q. And how long was that?

A. About half an hour. I didn't look at my watch; I can only say about.

Q. That is all I want to know. You said you didn't write anything down at all, didn't you?

A. No, only the number of the boat, *U.M.D. 2.*

Q. And you heard through the loud speaker, in Italian, "We are part of the crew of the Nassau," right?

A. Yes. Now I repeat again I don't know whether that was the exact words, but the meaning was that.

Q. That was the meaning of that, as you understood it?

A. Yes.

Q. As you understood it, they said, "We are part of the crew of the Nassau," right?

A. Yes.

Q. And then they said, "We are talking in the name" of what? What was the name?

A. I remember the word, "International." I don't know whether it was an International Syndicate or International Federation. I heard "International."

Q. And that is all you heard that you could make out, was the word "International": is that right?

A. Well, I heard the word, "International," but they were talking Italian, and I don't remember now whether they said "Syndicate" or "Federation" or "Union."

Q. They said, "You do what you want?"

A. Yes, sir.

Q. And I think you also said that they said, "We want you to come down"?

A. Yes, sir.

Q. Did any of the members of the crew of the *Victoria* leave the ship at that time, or at any time that you were on it?

A. No, nobody came down, because they could not go down. They wanted to get down, but they could not.

[fol. 157] Mr. Ostrin: I move that that be stricken, that they wanted to go down.

The Court: Strike it out.

Q. They did not get off the ship, is that right?

A. They couldn't unless they could swim.

Mr. Ostrin: I move that that be stricken.

The Court: I will allow that.

Q. They stayed on the ship?

The Court: Unless someone could swim away from Quarantine all the way to the dock.

Mr. Ostrin: By the same token, this witness does not know whether these people wanted to leave or didn't want to leave. He couldn't project his mind in advance, your Honor.

The Court: I will allow that.

Did they leave at any time thereafter?

The Witness: No, but part of the crew refused to leave.

The Court: Did any part of the crew leave at any time, since the boat arrived in New York Harbor?

The Witness: You are talking about the *Victoria?*

The Court: The *Victoria.*

The Witness: The *Victoria* didn't move from there. It was always in Quarantine.

The Court: And did the seamen remain aboard the ship all this time?

The Witness: Well, we were ready to leave, but there were discussions on board whether to leave or not.

[fol. 158] Q. Discussions aboard by whom? I don't know if I follow you.

A. With part of the crew.

Q. You are talking about discussions among the officers, is that right?

A. Oh, no, not among the officers.

Q. Let me see if I can understand one thing. Let us get it straight, and I want short, simple answers, if I can get them. Did any members of the crew of the *Victoria* leave that ship while you were there?

A. No.

Q. The answer is no, is that right?

A. No.

Q. So far as you know, did any members of the *Victoria* leave the ship from the time it got into New York to the present day?

A. Well, I don't know what you mean by leave, because some of the crew, they go off board, they go on shore, and they go back on board.

Q. Those who were off duty got off the ship and then when the time came to go back to work, they got on the ship; is that right?

A. Yes, that is true.

The Court: Then why didn't the boat sail?

Mr. Ostrin: I am going to object to that question, if your Honor please. I don't know this witness is qualified to say whether it did or it didn't sail.

The Court: Is there any dispute that the boat is still there?

Mr. Ostrin: The boat is still there and the crew is still there.

The Court: Why didn't the boat sail? The objection is overruled.

The Witness: Because part of the crew refused to leave.

[fol. 159] The Court: Refused to what?

The Witness: Refused to leave.

The Court: Leave what?

The Witness: Leave with the ship, to go with the ship.

The Court: They didn't want to work, is that what you mean?

The Witness: They did not want to leave.

Mr. Ostrin: I am going to object to that as being hearsay, like most of his testimony is, and based upon the operation of his own mind, and pure speculation.

The Court: Overruled.

The Witness: By leave I mean to sail.

Q. During this time passengers were going aboard the ship?

A. Yes, sir.

Q. And were they being helped aboard by the members of the crew of the *Victoria*?

A. Yes, sir, just part of the crew.

Q. The entire crew doesn't help one passenger get on board ship, does it?

A. That is exact. That is right.

Q. Is it correct to say that as many men of the crew that were necessary to help the passengers board the ship did help them?

A. Yes, sir, that is right.

Q. And did they help them with their baggage?

A. Yes, sir.

Q. Did you see any member of the crew refuse to help anybody with baggage?

A. No.

Q. You say that during the time the men were using the loud speaker on the UMD-2 that they read a letter from Mr. Berlingeri. Do you remember what they read? Do [fol. 160] you remember some of the things that were included in that letter?

A. I remember more or less.

Q. I show you now Defendants' Exhibit A in Evidence and ask you whether this refreshes your recollection as to what was said (handing to witness)?

Mr. Stanton: Your Honor, only the caption of that letter is in evidence. It has been introduced only for the limited purpose.

Mr. Ostrin: Now I am showing him the entire letter and saying if that refreshes his recollection.

A. This is the letter but I cannot say whether it was read in its entirety or just part of it.

Q. More or less it is correct?

A. More or less, yes.

Mr. Ostrin: I offer the letter in evidence in its entirety.

Mr. Stanton: I have no objection to the letter.

Mr. Ostrin: Now may I offer an official translation.

(Translation of Exhibit A received in evidence and marked Defendants' Exhibit A-1.)

Q. I understand that you testified that these men on the boat suggested that they would get a doctor aboard to help them get off the ship because of a belly-ache or something, is that right?

A. Yes, sir.

Q. Do you know of any doctor who went aboard the ship to give medical assistance to any crew member who claimed [fol. 161] having a belly-ache?

A. Not that I know. I know that as far as I know no doctor went on board.

Q. Do you know of any member of the crew of the *Victoria* who asked to be excused to go ashore because he was sick?

A. No, as far as I know I don't know. This is of my competence. It is not my business.

Q. Were the other things you just testified, the other things that you talked about, your business?

Mr. Stanton: Objected to as argumentative.

The Court: I will allow it.

A. I was a witness. I talk about things I have seen.

Q. By whom are you paid?

A. Incres Steamship Company.

Q. Are you paid by check?

A. Sometimes yes, sometimes not.

Q. And who hands you the check?

A. I receive payment, expense payments, from the Agency on account of the Incres Steamship Company.

Q. The Agency hands it to you, is that right?

A. I receive the payment through the Agency. So the payment was made from Rotterdam the same way.

Mr. Ostrin: I move that the latter part of the answer be stricken.

The Court: I will allow it.

Q. Were you paid in Liras or in dollars?

A. Here they pay me in dollars, payment for expenses because I live here. I live in New York.

[fol. 162] COLLOQUY

Q. How long have you been living in New York?

A. I arrived in New York with the *Victoria* from Le Havre.

Q. When was that?

A. January 25th. Since then I spent part of my time on board and part of my time on shore.

Mr. Ostrin: No further questions.

Mr. Stanton: No further questions.

(Witness excused.)

The Court: Because of the regrettable loss sustained with the passing of Mr. Justice Frank of the Appellate Division the Court will stay in recess in this case until 2:00 o'clock tomorrow. The entire court will recess for the day. I shall be here at 2:00 o'clock.

Mr. Ostrin: If your Honor pleases, may I at this time call upon the plaintiff to produce the agreement between the Agency and the Ineres Steamship Company? I would like to be heard on that.

The Court: What do you say?

Mr. McAllister: We see no relevance whatsoever to that document in view of your Honor's rulings, your Honor.

The Court: I think you ought to let him see it.

Mr. McAllister: Very well, we will.

The Court: Recess till tomorrow at 2:00 o'clock.

(Court thereupon adjourned to May 20th, 1960 at 2:00 P. M.)

[fol. 163] Friday, 2:20 o'clock p. m., May 20, 1960

The Court: All right, gentlemen.

Mr. Stratton: Plaintiff calls Captain Francesco Perilli.

Mr. Ostrin: If your Honor please, last night I requested production of the Agency agreement.

The Court: Yes. Mr. McAllister said he would produce it. Have you got it?

Mr. McAllister: You want it? I have to make a brief statement about it because we have been unable to find the original. It's an old document and we have found only a photostat of the copy of it which appears in the minute books five years ago. The original document itself we have not been able to find. The secretary has not been able to find as yet.

The Court: Do you state that that is a copy of it?

Mr. McAllister: I am so informed.

The Court: Substantially a copy of it?

Mr. McAllister: Yes, your Honor.

Mr. Ostrin: May I see it? And may I just have a moment or two to look at it, your Honor?

The Court: Yes. (A pause.)

Mr. Ostrin: You will hold this available for us when we need it?

Mr. McAllister: Yes.

Mr. Stratton: Plaintiff calls Captain Perilli, your Honor Captain Carilli?

The Court: Speaks English?

Mr. Stratton: Yes.

[fol. 164] Francesco Perilli, having been duly sworn as a witness for plaintiff, testified as follows, through Official Italian Interpreter Luciano Porcelli only where indicated:

Interpreter: The name is F-r-a-n-c-e-s-c-o P-e-r-i-l-l-i. The home address is Genoa. Genoa, Italy.

Direct examination.

By Mr. Stratton:

Q. Captain Perilli, by whom are you employed?
A. Pardon?
Q. By whom are you employed?
A. By the Ineres Line.
Q. What ship do you command?
A. Victoria.
Q. Where is the Victoria now?
A. She's at anchor off Staten Island.
Q. How long has she been there?
A. Since Sunday, about two o'clock.
Q. Is that Sunday, May 15th?
A. Pardon?
Q. May 15th?
A. Yes, May 15.
Q. Where had she come from?
A. From South America, Trujillo.

Interpreter: South America, Trujillo, Dominican Republic.

Q. Did she have passengers on board, Captain?
A. Yes.
Q. Where was she scheduled to dock?
A. Pier 42.
Q. Did she dock at Pier 42?
A. No.
Q. How were the passengers disembarked?
A. By tugs. By the Moran tugs.
Q. When was her next scheduled cruise?
A. Pardon?

[fol. 165] Q. When was her next scheduled cruise?
A. On the 16th.
Q. Captain, on the 15th was your ship the Victoria approached by this boat? I show you a picture of Plaintiff's Exhibit 3. Plaintiff's Exhibit 3.
A. Yes. Yes, I recognize it.
Q. And what did that boat do?

By the Court:

Q. Would you wait just a minute? I'd like to—

A. Well, the boat—

Q. Wait a minute, Captain. Before the ship got to Quarantine were there any discussions or negotiations on board the ship between the officers and the crew?

A. No, no.

Q. Was there any indication of any difficulty?

A. No.

Q. Trouble?

A. No.

Q. Or threatened strike?

A. No.

Q. Or picketing?

A. No.

The Court: All right. Go ahead, sir.

By Mr. Stratton:

Q. Had there ever been any such indications of threatened strike in the past on your ship, Captain?

A. No.

Q. What did the picket boat do, the *UMD 2*?

A. Well, I couldn't see it entirely, but it went in alongside the tug boat, you know, and I think, you know, told them to go away.

Mr. Ostrin: I'm sorry.

A. Told them to go away. To go away. They were close to the ship.

[fol. 166] By the Court:

Q. Wait a minute. Who told whom to go away? The boat came alongside?

A. The boat came alongside, with tugs.

Q. The tugs.

A. Yes.

Q. And then?

A. And then, you know, a man went on board.

Q. From your ship?

A. No, from this small boat.
Q. Came aboard your ship?
A. No, on board the tug.
Q. One of the tugs. I see. And then?
A. And then they went away.
Q. The tugs went away.
A. Went away.
Q. And then?
A. And then they came back, you know, later. When—
Q. Who came back later?
A. The tugs.
Q. The tugs came back later? Yes?
A. In the meantime, you know, the police boat came around the ship.
Q. Yes. Go ahead. Just continue.
A. And the police boat, you know, went to talk, you know, with the tugs, with the Moran tugs.
Q. Yes?
A. And after they came back and they disembarked with the passengers.
Q. The tugs?
A. The tugs.
Q. I see. All right. Now what about this—this boat—What do you call that?

Mr. Stratton: The *UMD 2*, your Honor.

Q. What did that boat do, if anything, when it approached the tugs? Anybody on that boat do anything or say anything?

(Interpreter spoke to the witness in Italian.)

[fol. 167] A. No, they didn't come on board. They went, you know, to talk with the tugs, that's all.

Mr. Ostrin: I'm sorry. I don't—I didn't hear that.
The Court: They went only on the tugs. They went only on the tugs.
Mr. Ostrin: On the tugs.
The Court: Yes.

By Mr. Stratton:

Q. Captain, were passengers brought on board the *Victoria* on Tuesday, May 17?

A. Yes.

Q. At what time did the passengers start to come on board?

A. Well, I think the first boat came about two o'clock.

Q. And what was the scheduled hour of departure of the *Victoria*, on the cruise?

A. We should have sailed at four o'clock but we were not ready at four o'clock.

Q. Where was the cruise going to go?

A. Pardon?

Q. Where was the ship going to go, with these passengers?

A. See if I remember now—we had to go to Bermuda.

Q. Did passengers continue to arrive after two o'clock?

A. Yes, till about half past five.

Q. Till about half past five.

A. Yes.

Q. And did you see the *UMD 2* on that day, Tuesday, May 17?

A. Yes.

Q. Will you tell us what happened then?

A. Well, that boat, you know, came around the ship, you know, and they told, you know, we are members, the crew members of the *Nassau*. And they started to talk, you know, inviting the crew our crew, you know, to join—

Mr. Ostrin: I'm sorry, I don't get that.

[fol. 168] A. —and inviting them to go ashore.

The Court: Wait a minute, Captain. Would you read that, please?

Mr. Ostrin: I'm sorry, I don't hear it.

(Last complete answer was read.)

Q. And what did they say, Captain?

A. Who?

Q. The people on the *UMD 2*?

A. They also, you know, say, you know, to our crew, the way they should use and not to leave the ship, you know,

telling they were sick, you know, and they needed, you know, medical assistance, you know. Well, and they said so many things that I can't remember exactly, you know.

Q. And did some of the crewmen then change into their civilian clothes?

A. Yes, about fifteen members of the engine department, they changed into civil dresses, you know, and they went on the gangway and are ready to leave the ship.

Q. And then what happened?

A. Then I sent—They told me about this, because I was on the bridge, and then I sent the staff captain down.

Mr. Ostrin: Excuse me. I'm going to object to anything that was told to him, as being hearsay.

The Court: All right.

Mr. Ostrin: He said, I was then on the bridge.

By the Court:

Q. Who told you? One of the men told you?

A. Yes. I don't remember who told me. An officer—I think the officer, the officer was on duty on the gangway.

Q. And what did he do? He came to see you?

A. He came to see me.

[fol. 169] Q. And he had— Wait a minute. And he had a conversation with you?

A. Yes.

Q. And after that what did you do?

A. I called the staff captain.

Q. Yes?

A. And I told him to go down and clear the gangway.

The Court: I see. All right.

Mr. Ostrin: May I get the last part of that? Told him to go down and—

The Court: Clear the gangway.

Mr. Ostrin: Clear the gangway. I'm sorry.

By Mr. Stratton:

Q. And after the staff captain left you, did passengers continue to come aboard the *Victoria*?

A. Yes.

Q. And how many passengers came aboard the *Victoria?*

A. I think one hundred and ten.

Q. And when had the last of them come aboard the *Victoria?*

A. About half past five.

Q. And when was it your intention to sail?

A. At once.

Q. Did you sail?

A. No.

Q. Why not?

A. Because the engine depart—the members of the engine department refused.

The Court: The members of the who? The members of what?

Interpreter: Engine department.

Witness: Engine department.

The Court: Oh, engine department. I see.

Q. Will you tell us the facts surrounding their refusal, Captain?

[fol. 170] The Court: Did you talk to any of them?

Witness: Oh, yes.

The Court: All right, tell us what you said to them and what they said to you.

Witness: Well, it was—

The Court: Not in the exact words but in substance.

Witness: Yes.

Q. Tell us the whole story, Captain.

A. The whole story.

Q. Yes.

Mr. Ostrin: I'm going to object to this, if your Honor please, unless there is some evidence binding these conversations with the defendant International Maritime Workers Union.

The Court: Well, we'll get to that. We can only do one thing at a time, apparently. Let's see what went on, why this boat did not sail. Go ahead, sir.

A. About half past two, two members of the crew department came to me and they said, we want to get in touch by telephone with the union.

Q. May I interrupt, Captain? Was that before or after the picket boat *USMD 2* came up?

A. Before.

Q. Before the picket boat came up.

A. Before. That was about half past two, and the picket boat came at three o'clock about. I refused, you know, because I said we are in the road and we can't use the telephone, only on emergency call. And that for me is not an emergency call.

Mr. Ostrin: I'm sorry, your Honor. I don't want to [fol.171] interrupt, your Honor, but I am having very much difficulty in getting the stafement of the witness. Perhaps we could do better if there were an interpreter. I'm just not getting everything that he says.

The Court: Well, he said that he told them he could not let them use the telephone because they were on the road, and that the telephone could be used only in case of emergency.

Mr. Ostrin: Well, was this—was this—

The Court: That's what he told the engine man.

Mr. Ostrin: Was this the engine man who was on the crew?

The Court: Yes.

Mr. Ostrin: A member of the crew?

The Court: Yes.

Mr. Ostrin: You see, I'm not getting this. I just can't—

Mr. Stratton: Perhaps if Mr. Ostrin could sit closer. I think we can hear over here.

The Court: Well, you can't get much closer than you are now, unless you want to come inside.

Mr. Ostrin: Well, I'll try here (moving to the rail).

The Court: All right.

Q. What happened next, Captain?

A. And after they went away. I told the engine, I can't give this permission because telephone is only for emergency call. And they went away. After three o'clock came the picket boat, you know, and you know what happened.

[fol. 172] By the Court:

Q. No, we don't know what happened. You tell us.

A. I told, I think I told before.

Q. You mean when they went on the tugs?

A. Yes, when they went on the tugs, you know, when people went on the gangway, when we clear the gangway. They came back again at five o'clock.

Mr. Ostrin: Who came back again?

Q. Who came?

A. These two representatives from the engine room—from the engine department.

Q. Yes?

A. With two representatives from the steward department. They were four. And they came back to me asking to get in touch with the union.

Q. Did they mention any name?

A. No, only the union.

Q. The union.

A. With the union. And they told me, we are ready to leave, and if we can't get in touch with the union, if you write a declaration, declaring that we can't get in touch with the union, we sail.

Q. We sail?

A. Yes, they said we sail. I told them, I can't write this declaration without the permission of the company. In the meantime I phoned to the company. And they told me the president of the line is on the way to the *Victoria*. He came on board about half past six, I think.

Q. President of the line?

A. President of the line, came on board about half past six, and I told him, you know, what was going on. We called back again, you know, the four representatives, and they repeated, you know, that they wanted to get in touch with the union. And it was about eight o'clock, after the [fol. 173] discussion we had, you know, with the four representatives. At last we said all right, get in touch with the union, but if you get—if you don't get any answer, you know, from the union, what are you going to do. They said, we are ready to sail. At eight o'clock we called first

number. Nobody answered it. Then we called a second number. And the girl answered on the telephone. And after, you know, one of the representatives said, I want to talk with Mr. Shannon, said, and Mr.—or Mr. Chanikolas, Canikolas. I don't remember exactly the name.

Q. You don't remember the name? You don't recall?

Mr. Ostrin: Yes, Chimiklas I think it is, C-h-i-m-i-k-l-a-s. It's something like that.

The Court: Well, would you identify him, who—Is he connected with the union?

Mr. Ostrin: Yes, he's connected with the union.

The Court: With the union? I see. All right, sir.

Witness: After thirty-five minutes about, the girl answered, and she said, I can't find the two gentlemen. Then I told, you know the four representatives. Well, you couldn't get in touch with the union; then you should be ready to leave, to sail, as you promised before. But then they objected, and they said, Before to say yes or no, we want to get in touch, you know, with the entire crew. And they gave—and asked me permission to talk with the crew. They went and they came half an hour later and they told me the crew doesn't want to sail.

[fol. 174] I repeated again and I told them, you know, to go down and do their duty. And they said, No, we don't sail. It was exactly nine o'clock. Then I told them, you know, from this moment you refuse to sail, and you are on strike. They said, Yes. And they went away.

By the Court:

Q. Did they leave the boat?

A. No, no, no. They went down in the engine and that's all right. Nothing happened, you know. Only they refused to sail but they accomplished, they did the work for the serving the passengers in the steward department, at the table. At ten o'clock some stewards came back to me and they said, the two representatives from the steward department, they don't represent anything, because we are sailing—we are willing, willing to sail.

After this declaration we assembled all the steward department, the dining room, telling them if they wanted to

sail. They said yes, we want to sail, we don't want to join, you know, the—we don't want to join the engine department in the strike. All right. Then the situation was changed, because before we knew that the engine department and the steward department didn't want to—to sail. Instead now we have only the engine department who didn't want to sail. At two o'clock at night we assembled again all the deck department—the engine department, asking them again if they wanted to sail. They said, No, we don't want to sail, we call before, we want to get in touch with the union. Then I told them, All right, tomorrow morning [fol. 175] as soon as possible you can go ashore and get in touch with the union. And at six o'clock I called, you know, by phone taxi boats and six members of the engine department went ashore. At 9:30 we had a phone call from shore, and it was the leader of this—of this six men, who wanted to talk, you know, with the representative who was on board.

By Mr. Stratton:

Q. Whom do you mean by that?

Mr. Ostrin: I'm going to object to this now. I don't know who the leader is, and this is all being reported to the captain.

A. The leader of the six men was Mr. Bucovaz, and the other representative that we had on board was a Mr. Chapperini.

Q. Those are members of your crew, Captain?

A. Members of the engine department.

Interpreter: C-h-a-p-p-e-r-i-n-i.

Mr. Stratton: B-u-c-o-v-a-z.

Mr. Ostrin: Is this a phone call to the—I don't know. I didn't get that. Is this a—

Witness: We had a phone call from shore, by radio phone.

Mr. Ostrin: Was the phone to you? The telephone to you?

Witness: Phone to the ship.

Mr. Ostrin: But did you speak on the phone?

Witness: First spoke Mr. Chapperini.

Mr. Ostrin: Whom did he speak to?

Witness: To Mr. Bucovaz.

Mr. Ostrin: I'm going to object to any conversations [fol. 176] between Mr.—the two gentlemen just named, since it was not a conversation with the Captain.

Witness: Later. Just a minute.

Q. Go ahead, Captain.

A. Because, you know, from shore, from shore Mr. Bucovaz was the leader, you know, of the six representative and called the ship. And the radio operator told him, what do you want.

Mr. Ostrin: I'm going to object to what the radio operator told.

By the Court:

Q. Did you hear this?

Mr. Ostrin: This is replete with hearsay.

By the Court:

Q. Did you hear this?

A. Pardon?

Q. Did you hear this?

A. I didn't hear that. No. The radio operator after came to me and said, Captain—

Mr. Ostrin: I'm going to object to that.

A. —there is Mr. Bucovaz wants to talk with Mr. Chapperini.

Q. I see. All right. And then you put him on the phone?

A. I went in the radio station and I assisted to the conversation.

Q. I see.

A. Yes. And from shore Mr. Bucovaz told Mr. Chapperini, We confirm the order not to sail.

[fol. 177] Q. And what did Mr.—the man aboard ship say?

Interpreter: Chapperini.

A. Said all right. That's all. Then I got the telephone and I asked of Mr. Bucovaz, Is this the order of the union?

Q. Yes? What did he say?

A. Well, he didn't know, you know, what to answer.

Mr. Ostrin: I'm going to object to anything he didn't know how to.

Q. Did he answer?

Mr. Ostrin: Now there's been an awful lot of hearsay so far.

A. At last he answered after a few seconds, he answered and he said, No, it is our willing, you know, we don't want to leave.

Q. We don't want to leave. I see.

A. The union let us decide if to leave or not. Then I asked again, you know, is the—is the union, you know—has the union confirmed, you know, the order not to sail? Then Mr. Bucovaz said, said in Italian, logical, it is logical.

Interpreter: It is logical.

By Mr. Stratton:

Q. Captain, were the passengers still on board?

A. Yes. And after this declaration, you know, I gave permission to the passengers to go ashore.

Q. And did they go ashore?

A. They went ashore.

[fol. 178] Q. What day was that? Wednesday?

A. Pardon?

Q. Was that Wednesday?

A. Yes. And at eleven o'clock, you know, they were all—all out.

Q. And was the cruise canceled?

A. Yes.

Q. Captain, where does the crew of your ship live now?

A. Pardon?

Q. Where does the crew of your ship live now?

A. On board. On board. Some of them are ashore, you know. Some of them are on leave. We gave short leaves, you know.

Q. And are you feeding them on board?

A. Yes.

Q. And are you providing launch service freely to them?

A. Yes.

Q. And they can come and go whenever they are not on duty; is that correct?

A. Yes.

Q. Captain, what nationality is your crew?

A. Italian.

Q. Where were they recruited?

A. In Genoa.

Mr. Stratton: No further questions.

Cross examination.

By Mr. Ostrin:

Q. Captain, you saw the boat that's on that picture for the first time on what day?

A. On Sunday, when we arrived.

Q. On Sunday when you arrived?

A. Yes.

Q. And what time was it that you saw the boat on Sunday? When you arrived?

A. Well, just after we arrived. About—we arrived at two o'clock, you know. About half past two, three o'clock. I can't remember exactly, you know.

Q. And what was the—This was on Sunday, right?

A. On Sunday. We arrived—

Q. And what was the boat doing?

A. Pardon?

[fol. 179] Q. What was that boat doing, the boat that's in that picture, plaintiff's Exhibit 3?

A. As I told before, they went to talk with the tug boats, you know, and after the tug boats went away. What they said I don't know because we were quite away. Can't tell you what they said, you know.

Q. You saw them approach the tug boats and then the tug boats went away.

A. Yes.

Q. Is that all that you saw this boat do on Sunday?

A. Pardon?

Q. Is that all that you saw this boat do on Sunday?

A. So I don't remember exactly, you know, what they did later, you know, because, you know, when the tug boats, you know, came around the ship, you know, when the tug boats came alongside the ship for disembarking the passengers, it was interesting to see the passengers off. And so I didn't mind very much, you know, what this little boat did.

Q. Now, did the men do—continue—the crew continue to do its work on Sunday?

A. The crew?

Q. Yes.

A. Yes.

Q. Nothing unusual?

A. Nothing.

Q. And did the crew continue to perform its duties after the boat that you saw was circling the *Victoria?*

A. Yes.

Q. And did the crew continue to perform its duties on Monday?

A. Yes.

Q. Now when was the next time that you saw the boat which is in evidence as Plaintiff's Exhibit 3?

A. Saw that boat again about three o'clock.

Q. About two o'clock?

A. Three o'clock.

Q. On what day? That was Tuesday?

A. Tuesday.

[fol. 180] Q. And you were standing on the bridge?

A. Not exactly on the bridge. I was on the boat deck.

Q. On the boat deck.

A. Just close to the bridge.

Q. And were you standing with anybody?

A. Well, I think so. Yes. There were other people with me, you know, I can't remember now.

Q. Any officers—

A. I remember—I remember quite close to me was Mr. Cattaneo.

Q. He was right close to you?

A. Pardon?

Q. He was right close to you?
A. Yes.
Q. You're sure of that. Were you talking to him?
A. Yes, we was talking together, you know.
Q. Pardon?
A. Yes, we were—
Q. How close to you was he?
A. We were talking like this, you know.
Q. Right next to—
A. Yes.
Q. Just like where the interpreter is standing next to you?
A. Yes.
Q. Now, you say you heard someone say something from the boat, the boat which is pictured as Plaintiff's Exhibit 3?
A. Yes.
Q. And what was it that you heard said?
A. Well, I heard so many things, you know, that I can't remember. But I heard them, you know, inviting our crew to join the *Nassau*, because they were fighting for the benefit, you know, of the crew. And one of them, you know, told, Come ashore, leave the ship as we did. And it was at that moment that about fifteen people from the engine department—yes—changed into civil dress and went to the gangway as I told before.
Q. How many members of the crew were present—
A. Where?
Q. On the deck of the ship?
A. Oh, about—that is very difficult to say because a lot were—were on deck. One hundred, one hundred and fifty. [fol. 181] Q. You'd say between a hundred and a hundred and fifty?
A. Maybe. You know, I couldn't see from the boat deck, you know. People were standing down on the promenade deck. I saw them, you know, on the bow only.
Q. And—
A. And they told, from the boat they told, you know, to the crew, if I—we will teach you the way to leave the ship. Tell them that you are—tell to your—to the captain or to

the officer that you are sick and that you need medical assistance.

Q. Well now—

A. And who is doing—and who is willing to do that, you know, raise the hand. And nobody raised the hand from the ship.

Q. Now later that day did any member of the crew tell you that he was sick and wanted to see a doctor?

A. No.

Q. Now, you say that some of the people from the engine department changed into their clothes?

A. Yes.

Q. Were all of those people on duty at that time?

A. No, they were not on duty I think because the—the engine—the watch was down in the engine room.

Q. Did any of the people who were on watch in the engine room change into their work clothes?

A. Pardon?

Q. I withdraw that question. Did any of the people who were on watch in the engine room change into their civilian clothes?

A. I don't know. I couldn't tell you.

Q. But you do know that those who changed into their civilian clothes were not on duty.

A. I suppose.

Q. Now customarily, Captain, when the vessel is in port, is it permissible for the people who are not on duty to go ashore?

A. Yes.

[fol. 182] Q. And as a matter of fact you have testified only a few moments ago that even now the people who are not on duty are permitted to go ashore.

A. Well, because we were—we were on the sailing time.

Q. All right. Now—

A. Because, you know, two hours before sailing, everybody must be on board, you know, according the law.

Q. Did those people leave the boat?

A. No.

Q. Would you say—

A. Because—

Q. —that the passengers who were boarding the ship—

Mr. Stratton: Just a minute. I think Mr. Ostrin cut off that answer.

Mr. Ostrin: Well, I submit that the question called for a yes or no answer. I asked him whether those people left the boat.

The Court: We have some language difficulty here and I think you ought to be—

Mr. Ostrin: I don't think that this witness is having any difficulty in understanding my questions.

The Court: You seem to have some difficulty in understanding him. You moved from one place to another and asked the stenographer to repeat it one or two times.

Mr. Ostrin: I'm sorry, your Honor, I just can't hear him.

The Court: I can't either on occasion.

Go ahead, finish the answer. Did you finish the answer? Or have you forgotten it now?

Witness: I said no, they didn't go ashore, because the staff captain, you know, forbade them to go ashore.

[fol. 183] Q. And they complied with his order?

A. Yes.

Q. Now during this time, as I understand your testimony, the passengers were boarding the ship?

A. Yes.

Q. Were the members of the crew assisting the passengers in boarding the vessel?

A. Yes.

Q. Were they carrying out the duties as was required of them during this time?

A. Yes.

Q. Now you said earlier that day, about 2:30 in the afternoon I think you said two members of the crew came to see you?

A. Yes.

Q. I wasn't too clear on that. And who were these two people?

A. Mr. Bucovaz and Mr. Chapperini.

Q. May I have the spelling of Mr. Bucovaz's name, please?

A. B-u—Bucovaz.

Interpreter: Bucovas, B-u-c-o-v-a-s.
Witness: Z.
Interpreter: Oh, Z. B-u-c-o-v— I don't know. This is not an Italian name.
Mr. Ostrin: Well, maybe the Captain can write it out and we can get the—
Witness: B-u-c-o-v-a-z.
Interpreter: Then do you want Chapperini?

Q. Well, before we get to Chapperini. Bucovaz, what was his position on the boat. What was his rating?
A. He was a motorman.
Q. A motorman. And is he employed in the engine room?
A. Yes.
Q. And would you give us the spelling or spell the name of the other individual for us?
A. Chiapperini.

Interpreter: C-h-i-a-p-p-e-r-i-n-i.
Witness: Yes.
[fol. 184] Mr. Ostrin: Once more, please.
Mr. Stratton: C-h-i-a-p-p-e-r-i-n-i.

Q. And what was Mr. Chiapperini's rating on the ship?
A. Chiapperini is a—a mechanic.
Q. And is he employed in the engine room?
A. Yes.
Q. Now am I to understand that both Mr. Bucovaz and Mr. Chiapperini came to see you sometime before you noticed that *UMD 2* boat; is that right?
A. Yes.
Q. That was even before the boat had arrived alongside or near the *SS. Victoria;* is that right?
A. Yes.
Q. And did they both speak to you?
A. Yes.
Q. And what was it that they said, and will you please identify which person said what? Do you understand that? I would like you to tell me what Mr. Bucovaz said to you—
A. Yes.
Q. And what Mr. Chiapperini said to you.
A. They told me that they wanted to call to the union.

Q. They both said that to you?
A. Yes.
Q. That they want to belong to the union?
A. Yes.
Q. Oh, call the union. I'm sorry.
A. They wanted, you know, to call the union.
Q. To call the union?
A. Speak to the union.
Q. And you said that they could not use the phone?
A. The phone.
Q. Is that right? And did they then leave?
A. Yes.
Q. And they went about their duties?
A. Yes.
Q. Now what time of the day was it when you were visited by two representatives from the engine department and two representatives from the stewards department?
A. I think it was about five o'clock.
[fol. 185] Q. And this was after the boat which is on Plaintiff's Exhibit 3 had left.
A. Yes.
Q. Where were you when they visited you?
A. In my quarters.
Q. And who were the people— Was it the same Mr. Bucovaz and Mr. Chiapperini of the engine room?
A. The other two people?
Q. No, no, no. Were Mr. Bucovaz and Mr. Chiapperini the two—two of the four people who visited you in your quarters?
A. They were Mr.—Mr. Bucovaz, Chiapperini and—
Q. Can you name the other two people?
A. Mr. Clarot.
Q. May we have that spelled, please?

(Witness wrote on pad.)

A. And the other—

Interpreter: C-l-a-r-o-t.

A. The other one—

Interpreter: I don't remember exactly now.

Q. And were Mr. Clarot and the other person whose name you now don't remember, representatives from the stewards department?

A. Yes. They said that.

Q. They said that. Well, did you know whether they were representatives of the— Did you know that they worked in the stewards department?

A. Yes.

Q. And as I understood your testimony, these four people asked for permission to get in touch with the union. Is that right?

A. Yes.

Q. Now what else was said at this meeting?

A. Pardon?

[fol. 186] Q. What else was said at this meeting, in your quarters?

A. Well, they said, they also said that if they couldn't get in touch with the union, they were willing to sail if the captain wrote a declaration where it was declared that they couldn't get in touch with the union.

Q. I don't quite understand that. They said to you—

A. They said, you know, we want to get in touch with the union because we want to get orders from the union. And I said to them, if you can't get in touch with the union, what are you going to do? And they said to me, it is enough for us to have a declaration from the captain where it is written that we haven't been able to get in touch with the union. After this declaration we are willing to leave.

Q. In other words, they said if you would write down on a piece of paper—

A. Yes.

Q. —that—

A. Pardon me.

Q. —they could not get in touch with the union, they would leave.

A. Yes.

Q. And then, as I understood your testimony, you said that you told them you had no authority to give them such a written note.

A. Yes.

Q. But you understood them to say that if you would put down in writing that they could not— that they were not permitted to get in touch with the union—with the union, they were ready to sail.

A. Yes.

Q. And you did not put that down in writing. Is that right?

A. Well, I—I didn't—after, you know, I did, you know. I put down, you know, in a paper, you know, the declaration. But they—

Q. That was later?

A. In the second time they didn't accept it.

Q. They did not accept it?

A. No.

[fol. 187] Q. All right. Now what happened after that?

A. In the meantime Mr. Berlingeri, President of the company, came on board. It was about—about seven, I think, six-thirty. He came with the Moran tug.

Q. Well, before that did I understand you to say that you called the company?

A. Yes, I called the company because I want—

Q. All right, now which company did you call? Did you call the Ineres Line?

A. I called the Ineres Line.

Q. And where did you call the Ineres Line?. Do you have their telephone number?

A. Yes, of course.

Q. Where are they located at?

A. They are located in Broadway, 39.

Q. Thirty-nine Broadway?

A. Thirty-nine Broadway.

Q. And is that the Ineres Steamship Company, Limited?

A. Ineres Line, you know, it's called.

Q. That's the name of your company, isn't it?

A. Ineres Line.

Q. Yes, that's the Ineres—you know the name of your company, don't you?

A. No. Ineres Line.

Q. And whom did you speak to?

A. I don't remember. Asked is Mr. Berlingeri there?

Q. Yes?

A. I don't remember if the girl on the phone told me Mr. Berlingeri is not here. He is on the way, you know, to the—to the *Victoria*.

Q. Now is it correct to say—you've been to New York on prior occasions, haven't you?

A. Pardon?

Q. You've been to New York on other occasions with the *Victoria*.

A. Oh yes.

[fol. 188] Q. And when you got to New York on other occasions with the *Victoria*, did you get in touch with someone of your employer at the 39 Broadway address?

A. No.

Mr. Stratton: Objection, irrelevant.

The Court: Overruled. Exception.

Q. Did you?

A. If I got in touch, you know, with the office.

Q. Yes.

A. Yes, I got in touch with the office.

Q. You have to; is that right?

A. Pardon?

Q. You say you had to?

A. I got in touch with the office.

Q. Yes. That's normal procedure; is that right?

A. Yes.

Q. And on other occasions with whom did you speak when you called the office at 39 Broadway?

A. I spoke, you know, with our agent, Mr. Wolfson.

Q. Did you report anything to him on those occasions concerning the voyage?

A. Well, I don't— Perhaps. Don't remember exactly what I said.

Q. Was it required of you to call Mr. Wolfson whenever you came into New York?

A. No.

Q. Did you ever in talking with Mr. Wolfson discuss incidents concerning the members of the crew, during the course of the voyage?

A. Well, generally no. No.

Q. Well, what were the things that you talked about?

A. Talk about—talk about the number of passengers who are coming on board, you know, and—well, things, you know, concerning, you know, the passengers.

Q. All right. And this time you tried to get Mr. Berlingeri at the same office.

A. Yes.

[fol. 189] Q. Had you been able to reach Mr. Berlingeri at this office on previous occasions?

A. Yes.

Q. Did you report to him at any time concerning the performance of the ship or concerning the activities of the crew?

A. Of course. He is the President of the line.

Q. You did?

A. Yes.

Q. Did you talk to him about disciplinary action that you may have taken against a member of the crew?

A. I didn't take any—any—

Q. I mean on some other occasion, not about—

A. No. No.

Q. Did you talk to him about promotions? In ratings?

A. Yes.

Q. On other occasions; is that right?

A. Yes.

Q. Did you talk to him about grievances that the members of the crew might have had during the course of a voyage?

A. Please?

Q. Did you talk—

A. (After interpreter spoke in Italian) No.

Q. Did you have any grievances in the course of other voyages?

A. No.

Q. Never had a grievance?

A. On my ship, no.

Q. All of your people were happy with their conditions of employment.

A. They were.

Q. No problems.

A. No problems.

Q. Never any question about overtime?

A. About overtime? We changed, you know, the overtime.

Q. You changed it?

A. Yes, about the overtime, you know, We—well, it is difficult to explain.

Q. Well, supposing you try to explain it.

(Witness spoke in Italian.)

Interpreter: Well, when we started—

Witness: When we left Genoa—

[fol. 190] Interpreter: We had a contract.

Witness: We had a contract about the overtime. That contract about the overtime was changed during the —during the voyage.

Q. It was changed by the company? Or by you?

A. By the company.

Q. And did any of the crew members object to the change?

A. No, because it was an improving.

Q. It was an improvement.

A. Yes, an improvement.

Mr. Ostrin: May I have this marked for identification, please?

(Paper was marked Defendant's Exhibit C for Identification.)

Q. By the way, Captain, on this ship the overtime that you just mentioned, did the members of the crew request the improvement of that change?

A. They didn't; I did.

Q. You did?

A. Yes.

Q. And they had not asked you about it before; did they?

A. No.

Q. Now I show you Defendant's Exhibit C for identification and I ask you what that paper is.

A. This is the crew roll and articles of agreement.

Mr. Stratton: I didn't hear that.

The Witness: This is the crew roll and articles of agreement by the Ineres Company.

Q. Is that the document that every crew member signs when he obtains employment?

A. Yes.

Q. On the Ineres Line?

A. Yes.

[fol. 191] Mr. Ostrin: I offer it in evidence.

The Witness: But that is not all the contract.

Q. We will get to the rest of it. Just be patient, Captain. I want to see the rest of the contract also.

Mr. Stratton: Your Honor, we will object to the admission of this Exhibit C in evidence, on the ground that it is immaterial and irrelevant. It is part of an inquiry into internal matters of a foreign flag ship.

The Court: Overruled.

(Defendant's Exhibit C for identification was marked in evidence.)

Q. This document that you have before you, Defendant's Exhibit C in evidence, says that the seamen shall embark at the Port of New York, is that right?

A. What article are you reading?

Q. Paragraph 1. Is that right?

A. This is the *Nassau*, not the *Victoria*.

Q. So far as the *Victoria* articles are concerned, do they also provide that the crew members shall embark at the Port of New York?

A. No. They have been engaged in Genoa. This girl here perhaps came to New York by plane and so she embarked in New York. That is the reason. She signed in Genoa the contract.

Q. Is it your testimony, Captain, that the crew members of the *Victoria*, when they sign articles, those articles do not say that they are to embark at the Port of New York?

A. If they come from Genoa by plane or by ship, and the ship is in New York, of course, they embark in New York.

[fol. 192] Q. Does that happen?

A. Very often.

Q. It happens very often when somebody is hired in Genoa while the ship is in New York, they either fly him over or they put him on the next ship and he then embarks at New York, is that right?

A. Of course, but they sign the contract in Genoa.

Q. Where was this contract signed, Captain? In Genoa?

A. In Genoa. It was signed by the Consulate of Liberia in Genoa.

Q. Captain, when a person, a member of your crew, quits his job in the Port of New York, does the company pay his transportation back to Genoa?

A. If they go, if they are discharged by the company, yes. If they go away by their own will, they pay by themselves.

Q. In other words, if the seaman quits of his own will, then he is required to pay his own transportation back to Italy, is that right?

A. Yes.

Q. And that is provided for in Paragraph 8 of these articles?

A. No, we never did. This article has never been applied.

Q. But it does provide, does it not, that where the member of the crew voluntarily quits, he quits of his own free will, that there is a deduction of his wages, and so on and so forth, is that right? That is what it says?

Mr. Stratton: I don't see the possible relevancy of this line of inquiry, in any event.

Mr. Ostrin: If you don't see it, I am sorry, sir.

You are claiming desertion here and this obviates it.

Mr. Stratton: May I be heard, Mr. Ostrin? This document speaks for itself.

The Court: Yes, on that basis I think the objection is well taken.

[fol. 193] Q. Captain, you have said that in all the years that you have been Master of the *Victoria* that you never applied the penalty that is provided for in Paragraph 8, is that right?

A. Never.

Q. But the penalty is there to be used if you want to apply it, isn't that right?

Mr. Stratton: Same objection.

The Court: Same ruling.

Q. Captain, is it a fact that the members of the crew of the *Victoria* also sign the same kind of ship's articles?

A. Yes.

Q. That is represented by Defendant's Exhibit C?

A. Yes.

Q. And the only difference would be the name of the ship, is that right?

A. Yes.

Q. You said, Captain, that there is also more than just these articles of agreement; is that right?

A. Yes, sir.

Q. Will you tell us about the other part of the agreement, Captain?

A. Well, that is very hard, and very long to explain, because it is a book.

Q. It is a book?

A. Yes.

Q. And when these people sign their articles, when they sign a paper represented by Defendant's Exhibit C, are they given a copy of this book that you refer to?

A. Not to every member, but the copy is on board. Every department has a copy.

Q. And do you have a copy of that agreement available, Captain?

A. Not here.

Mr. Ostrin: May I ask that the plaintiff produce a copy of the agreement, the supplemental agreement, or the agree-[fol. 194] ment to which reference is made in Defendant's Exhibit C in evidence?

Mr. Stratton: Your Honor, I don't believe we have a copy of that in court today and I don't see the relevancy.

The Court: At the next session we will have it here.

Mr. Ostrin: At the next session?

The Court: Yes.

Mr. Ostrin: Very well.

Q. Captain, your vessel goes from New York to some islands in the Caribbean, is that right?

A. Yes.

Q. Where does the cruise originate? Does it originate in the Caribbean or does it originate in New York?

A. What?

Q. Where does it start? Where does the voyage start?

A. From New York.

Q. Always from New York, Captain?

A. Well, it starts not always from New York, because we left also from Le Havre for another cruise.

Q. But on your regular normal cruise operation, Captain, is it a fact that the voyage starts at New York, goes to some island in the Caribbean, and then terminates in New York?

Mr. Stratton: I will object to that question as calling for a conclusion as to what the meaning of the word "normal" is, your Honor. If we can get the facts underlying it—

The Court: As a general rule?

Mr. Ostrin: As a general rule.

Q. Do you understand the question, Captain?

A. Yes.

[fol. 195] Q. What is your answer?

A. Just generally we start in New York and we come back to New York.

Q. So the voyage generally starts in New York and ends in New York, is that right?

A. Yes.

Q. Captain, assuming that one of your crew members wanted to leave the ship while in some Caribbean Island where your vessel is docked may he leave his job at that port in the Caribbean?

A. I don't know. That never happened.

Q. Let me ask you, you are the Master of this vessel. If a member of your crew wanted to leave his vessel, leave his employment while the vessel was docked at a Caribbean port, would he be allowed to do that?

A. It depends. Sometimes I would say yes, sometimes I would say no, because in our cruises the passenger pays for the cruise and when we do have a certain number of passengers we do need the whole crew to accomplish all the services and I can't allow the members of the crew

to leave the ship when I have a full ship and when I need all the crew.

Q. Under those circumstances would it be your policy then to say, in substance, wait until we get back to New York and then you can quit?

A. Yes.

Q. That is your answer?

A. But in certain cases I let people leave the ship not in New York. In Nassau, for instance.

Q. There would be times when you would let them quit the ship on their own free will in Nassau, right?

A. Pardon me?

Q. On certain occasions you would let them quit the ship in Nassau?

A. Yes.

Q. But in certain emergency situations you would say: "No, wait until we get back to New York and then you can quit."?

A. Of course.

[fol. 196] Q. So, as I understand it, Captain, your crew members can quit their vessel whenever they want to, either in a port in the Caribbean, with your permission, or in New York with or without your permission?

A. In New York also without my permission because they can leave the ship in the Caribbean with my permission.

Q. That is right. Let us get back to what happened on Tuesday of this week.

The Court: Before you do that, let us take a few minutes recess.

(Short recess.)

(After recess.)

Q. Captain, you said that after you indicated that you had no authority to sign the declaration that this delegation wanted you to sign you called the company's office and you were told that Mr. Berlingeri left for the ship; is that right?

A. Yes.

Q. Then you spoke with Mr. Berlingeri; is that right?

A. Yes.

Q. And, as I understand it, there was a meeting at which you, Mr. Berlingeri and the four crew members whom you mentioned were present; is that right?

A. Yes, sir.

Q. And at what time of the day was that, Captain?

A. It was, I think, about 7:00, a quarter past 7:00.

Q. And this meeting took place in your quarters?

A. In my quarters.

Q. And what was said at that meeting?

A. Pardon?

Q. What was said at that time?

The Court: By whom?

[fol. 197] Q. (Continuing) By you, by Mr. Berlingeri and by the delegation?

A. We discussed about the sailing of the ship and the declaration, and Mr. Berlingeri agreed to write this declaration, and also they asked to get in touch with the Union.

Q. They again asked to get in touch with the Union?

A. With the Union, and I told them: "If the Union didn't answer to your call what are you going to do?" And they said: "We are ready to sail."

Q. And then you allowed them to call the Union?

A. Yes.

Q. And they called the Union at about what time? 8:00 o'clock I think you said.

A. 8:00 o'clock.

Q. And they waited and they couldn't get anybody in?

A. Half an hour; no.

Q. And they couldn't get anybody in?

A. No.

Q. And then I think you said you gave them permission to get off the ship early the following morning?

A. No, no. No, I told them after when they couldn't get the answer from the Union, I told them: "Now you must accomplish your promise, please." They said: "No. We ask permission to get in touch with the entire crew."

Q. I see; I stand corrected. And then there was a meeting with the entire crew?

A. A meeting with the entire crew.

Q. And you were not present at this meeting; were you?
A. No.
Q. And did you receive a report about this meeting?
A. Yes, at 9:00 o'clock.
Q. And from whom did you receive the report?
A. The same four people.
Q. And they told you that the crew refused to sail?
A. Yes.

[fol. 198] Q. And then later that evening I think you said you were visited by some people from the Stewards Department?
A. From the Stewards Department.
Q. And how many people from the Stewards Department visited you?
A. About eight or ten.
Q. And all together how many people are there in the Stewards Department?
A. There are 200.
Q. 200?
A. Yes.
Q. In the Stewards Department?
A. Yes, steward and kitchen department all together.
Q. And eight or ten visited you?
A. Yes.
Q. And who was the spokesman?
A. Pardon?
Q. Who spoke of the eight or ten people?
A. All of them.
Q. They all at the same time?
A. Well, not at the same time, one after another.
Q. Can you give me the names of the people who were in this delegation of eight?
A. No, I don't remember.
Q. You don't remember any of them?
A. I don't remember.
Q. Could you point them out if you were to see them?
A. Well, perhaps a few of them, yes.
Q. And they told you—what did they tell you?
A. They told me that the two delegates, the two representatives didn't represent anyone but only themselves, and so after this declaration in accordance with Mr. Berlin-

geri having decided it, to assemble all the stewards department.

Q. They said that the two who had spoken to you did not represent the entire stewards department?

A. Yes.

Q. But only themselves?

A. Yes.

Q. Did these particular people say that they represented the entire stewards department?

A. No, they didn't say that.

[fol. 199] Q. They were speaking for themselves; right?

A. Yes.

Q. Eight out of about 50 or 200, is that right?

A. Yes.

Q. And they said that they wanted to sail?

A. Yes, sir.

Q. After that you said you called a meeting of the entire crew?

A. Of the stewards department.

Q. Of the entire stewards department?

A. In the dining room.

Q. In the dining room, and were you present?

A. Yes.

Q. And will you tell us what was said to this entire group?

A. I said if the two people who came before represented the stewards department. The majority said no.

Q. How much of the majority, how many said no and how many said yes, do you know?

A. Well, I can't tell you, but the majority of them signed the declaration they wanted to leave and they didn't want to join the strike.

Q. You had a signed declaration from them?

A. They signed.

Q. Was it already signed when you got there?

A. Only about ten people, ten or twelve people didn't sign.

Q. Only about ten or twelve of the 200 or so?

A. About; it was not exactly.

Q. And they said they wanted to sail?

A. Yes.

Q. And do you have that declaration here?

A. No, I haven't.

Q. Where is that declaration at the present time, do you know?

A. I don't know.

Q. You knew you were going to be in court today, didn't you?

A. Pardon?

[fol. 200] Q. You knew that you were going to be in court today, did you not?

A. Yes.

Q. And didn't you think it would be important to produce this signed declaration by so many people in your stewards department who wanted to sail on Tuesday night?

A. The president of the Line, I think, has the declaration. He was present when they signed it.

Q. The president of the Line?

A. Yes.

Q. That is Mr. Berlingeri?

A. Yes.

Q. Do you know that Mr. Berlingeri has already testified in this case? Do you not?

A. Yes.

Q. Did you turn this declaration over to Mr. Berlingeri?

A. Well, they signed it. I never had the declaration in my hands.

Q. Did you ever see the declaration?

A. Pardon?

Q. Did you ever see the declaration?

A. Yes, I saw the declaration.

Q. You saw it right there?

A. Yes.

Q. And they said that they were ready to sail; right?

A. Yes.

Q. What happened after that?

A. After that we talked about it with the Chief Engineer, with Mr. Berlingeri and with myself, and we decided to call again all the members of the engine department.

Q. And how many members of the engine department did you call?

A. All. All of them.

Q. How many would that be?

A. There are about 30, 31.

Q. And you called them all together and what did you say?

A. No, not all together. In the officers mess room.

Q. And what did you say?

A. And we told them the situation and we said the ship [fol. 201] is kept here only by you; the others, the deck department, the stewards department, want to leave, want to sail. And they said, "We don't sail."

Q. And what happened after that?

A. After that they said: "We would like to get in touch with the Union."

I said: "All right, tomorrow morning as soon as possible go ashore and get in touch with the Union and let me know as soon as possible your intentions."

Q. And then you arranged for a water taxi?

A. Yes, a taxi boat came.

Q. At what time?

A. Half past 6:00 in the morning.

Q. In the morning?

A. Yes.

Q. And who were on this taxi boat, do you know?

A. I don't know.

Q. Who went on this taxi boat?

A. Six of them.

Q. Was Mr.—

A. Bucovaz and the other five.

Q. Was Mr. Chiapperini on there?

A. No, Chiapperini was on board.

Q. Was Mr. Clarot on there?

A. No, only six from the engine department.

Q. Did you make a notation in writing as to the men who went on this taxi at 6:00 o'clock or 6:30 in the morning?

A. Yes, I have it on board but I haven't it here.

Q. You have it written down but you don't have it here. Will you produce that, please?

A. I think so. The officer on the gangway, perhaps he got the record.

Mr. Ostrin: May I ask that on the next session counsel produce the written memorandum containing the names of the persons who boarded this taxi boat?

[fol. 202] Mr. Stratton: We will do it if we can find it.

Q. And when did the boat return?

A. They didn't return.

Q. When did they call you?

A. They called at about half past 9:00.

Q. Who called you?

A. Mr. Bucovaz.

Q. What did he say?

A. He didn't call me, he called the radio operator. The radio operator told me Mr. Bucovaz wants to speak to Mr. Chiapperini and I said, all right, get permission for him to call Mr. Chiapperini.

Q. Who is Mr. Chiapperini?

A. Mr. Chiapperini is the other member of the engine department.

Q. Did you listen in on the conversation?

A. Yes.

Q. Was this on a loud speaker?

A. Yes.

Q. And you picked up a phone, is that what you did?

A. After. Before I left Bucovaz talked with Chiapperini.

Q. Did you hear Bucovaz's conversation with Chiapperini?

A. Yes.

Q. What was said?

A. Well, he said, we don't sail. He confirmed the order not to sail.

Q. Then what else happened? Did you hear anything else?

A. Then I spoke to Bucovaz.

Q. Did you hear them say to Chiapperini: "We asked the Union and the Union said that we could not sail"? You didn't hear that said, did you?

A. No, I didn't hear that. I can't tell it exactly, you know.

Q. Then you cut in and asked Mr. Bucovaz a question; right?

A. Yes, sir.

Q. And what was the question that you asked Mr. Bucovaz?

A. I said, "Did you get orders from the Union not to sail?"

[fol. 203] Q. What did he say?

A. He said, "No. We decided not to sail; not the union." And also he said that the union let us decide what to do.

Q. And did Mr. Bucovaz later return to the ship?

A. He came in the afternoon, I think.

Q. Did all eight return to the ship, or six?

A. Well, I think they all came back in the afternoon.

Q. Did the crew perform its duties on the vessel?

A. Yes.

Q. On Wednesday of this week?

A. Yes.

Q. Are they performing their duties on the vessel or did they perform their duties on the vessel on Thursday of this week?

A. Yes.

Q. And are they performing their duties on the veseel now?

A. Yes.

Q. Captain, did you receive a telephone call?

The Court: If the crew was performing its duties aboard the vessel, why didn't you sail?

The Witness: Because they refused to move the engines.

The Court: So they are not performing their duties there?

The Witness: Well, they are on duty in the engine room. They keep the lines, they keep the water running, the kitchen is working, they do all the duties on board, but running the engines.

The Court: Except to run the engines?

The Witness: Yes. They obey every order but moving the engines.

Q. Are there passengers aboard the ship now?

A. Pardon?

Q. Are there passengers aboard the ship now?

A. No.

[fol. 204] Q. Did you receive a communication from the Italian Consul some day this week?

A. Yes, through the office.

Q. When was it that you received this communication?

A. About twelve o'clock, I think.

Q. On what day?

A. On Wednesday.

Q. And did you talk to the Consul?

A. No, no, I talked with somebody at the office.

Q. Did you know what he wanted?

A. They said: "We had a complaint from the Italian Consulate that you don't give permission to your crew to go ashore."

And I answered it with one word, "It's a lie, they have permission to go ashore, and to demonstrate to you, they went ashore this morning at 6:30."

Q. And they go and they come?

A. Yes. And they have to hire a boat for four hours a day, just to send these people ashore.

Q. Did they go ashore before Wednesday, before you got this call from the Consul?

A. Yes, they went. They went in the morning, but I have orders to be on board two hours before sailing.

Mr. Ostrin: I have no further questions.

(Witness excused.)

Mr. Stratton: The plaintiff calls Mr. Anderson.

The Court: Gentlemen, let us see if we can agree on a modus operandi. Do you think you can finish this afternoon?

Mr. McAllister: Your Honor, we would like to proceed with as much as we possibly can, because we have witnesses who would sail as soon as they could, as soon as this strike [fol. 205] was ended. The strike is holding the ships in port.

The Court: I don't think that the strike would be ended at the end of this hearing today.

Mr. McAllister: Certainly, I don't know, but if the strike would end, then the ships would be free to continue.

The Court: I don't think that you have a few days of testimony.

Mr. Stratton: We have witnesses.

Mr. McAllister: What kind of a schedule may we have? We have witnesses here. We would like to go forward with a few of them if we can and finish this particular episode. The rest of our witnesses I don't think will take too long. Perhaps the cross won't be quite so long.

The next witness is to be Mr. Anderson, and we will take up this *U. M. D. 2* incident. I don't know that the cross examination would be extended.

Mr. Ostrin: I don't know, your Honor, and I certainly don't want to be limited in cross examination.

The Court: I don't mind spending another hour, but so far as I am concerned, you are not going to gain anything.

Mr. Ostrin: These people are all available.

Mr. McAllister: May we proceed on Monday?

The Court: Yes, in Special Term, Part II, Room 321, at 9:30.

Mr. Stratton: Would your Honor want to hear any more testimony this afternoon?

[fol. 206] The Court: After what happened yesterday and this morning I am a little tired.

(Court thereupon adjourned to Monday, May 23, 1960, at 9:30 o'clock A.M., in Room 321.)

New York, N.Y. Monday, May 23, 1960, 9:30 A.M.

TRIAL CONTINUED

Appearances: (Same as heretofore)

Mr. Stratton: The plaintiff calls Mr. Andersson.

HELGE OSWELD ANDERSSON, residing at 4901 8th Avenue, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stratton:

Q. Mr. Andersson, where do you live?

A. I live in 4901 8th Avenue, Brooklyn.

Q. By whom are you employed, Mr. Andersson?

A. My regular employer is United Marine Division AFofL, C.I.O. Local 333.

Q. AFofL, C.I.O., Local 333, is that a part the International Maritime Union?

A. No, sir.

Q. And what do you do for the United Maritime Division?

A. I run the motorboat.

Q. And is this the motorboat that you run for them, showing you Plaintiff's Exhibit 3 (handing to witness)?

A. Yes.

[fol. 207] Q. *U.M.D. 2*?

A. The *U.M.D. 2*, that is right.

Q. And were you running that boat Tuesday, May 17th?

A. Yes.

Q. And what did you do on that boat on that day?

A. On that day?

Q. Yes.

A. The whole day?

Q. Yes. Give us the whole day.

A. Well, in the morning I went up to Pier 42 about 8:00 o'clock.

Q. Pier 42 is where the *Nassau* is docked?

A. Yes.

Q. What did you do?

A. When I came up there I got orders to go back to Pier 11.

Q. Who gave you those orders?

A. That was one of the pickets that I had aboard the boat before.

Q. What?

A. The picket.
Q. One of the pickets?
A. Yes.
Q. What is the picket's name?
A. Well, his name was David, as far as I know.
Q. David?
A. Yes.
Q. Was he a member of the International Maritime Workers Union?
A. That I couldn't tell you.
Q. Was he picketing on behalf of the International Maritime Workers Union?
A. He had a picket sign on him when he was aboard the boat, yes.
Q. Do you remember what the picket sign said?
A. Some of it I think. "We want a contract," or something like that.
Q. And was he picketing the *Nassau?*
A. No.
Q. Where was he standing?
A. He was on the after deck behind the cabin.
Q. On the after deck, was it?
A. Of the boat.
Q. What time was this?
A. What time?
[fol. 208] Q. Yes.
A. It was Tuesday. Let's see. This was about from 8:00—Tuesday we didn't do no picketing.
Q. Tuesday you didn't do any picketing?
A. No.
Q. When did you see this man who told you to go back to Pier 11?
A. That was the day he had been aboard Monday. He would have been aboard Monday.
Q. He had been on your boat Monday?
A. Monday, yes.
Q. And where did you see him on Tuesday?
A. On Tuesday he was at the bulkhead.
Q. Where?
A. At the bulkhead.
Q. The bulkhead of what?

A. Of the north side of 42.
Q. The north side of 42?
A. Pier 42.
Q. That is where the Nassau was?
A. Yes.
Q. And what did he tell you to do?
A. He told me to go back to Pier 11 and stand by.
Q. And to stand by?
A. Yes.
Q. And what did you do?
A. I stood by there all day. I washed down the boat and cleaned up.
Q. And then what did you do?
A. Then those fellows came down around 3:00 o'clock.
Q. What fellows were those?
A. I don't see them.
Q. Do you know their names?
A. I only know one, one guy's name.
Q. What is his name?
A. Andy.
Q. Andy what?
A. That's all I know.
Q. Did you know Andy?
A. I know Andy from Pier 42, yes.
Q. What is his job?
A. His job, I believe, is picket captain. I am not sure, but I believe that,
Q. He is the picket captain?
A. Yes.
[fol. 209] Q. For the I. M. W. U.?
A. Yes.
Q. And what did Andy do when you next saw him, as you say, about 3:00 o'clock?
A. Well, he came down with them other four men.
Q. He came down with how many men?
A. Four men.
Q. His name was Andy or Angie?
A. Andy, I believe.
Q. Andy?
A. Andy, yes.
Q. Will you give us a description of Andy or Angie?

A. Well, he is a colored man.
Q. Have you seen him in court today?
A. No.

Mr. Ostrin: May it please the Court, I am going to object to this line of inquiry. To this date and as of this time, your Honor, whatever evidence has been offered has been offered after the picketing ceased. There has not been any evidence whatsoever of purported or alleged unlawful, violent picketing of any kind whatsoever prior to the issuance of the temporary restraining order.

All of this testimony thus far, including that of this witness as of now, relates to matters occurring after the issuance of the temporary restraining order. I don't see, and I am not aware of any motion to punish for contempt. I am not aware of any claim that there has been any violation of the temporary restraining order, and I submit to your Honor that for the plaintiff to prevail on a motion for a temporary injunction it must establish some sort of unlawful conduct prior to the issuance of the temporary restraining order. Now, that has not been done here.

[fol. 210] The Court: We will see what develops. Overruled. I will give you an exception.

Q. About how old is Andy?
A. Oh, he is coming there now.

(A man enters the court room.)

Q. That is Andy?
A. Yes.

Mr. Stratton: The person known as Andy will you concede that he is connected with the International Maritime Workers Union?

Mr. Ostrin: I will concede he is an employee of the Union, that he is an official.

Mr. Stratton: May we have his full name?

Mr. Ostrin: His name is Rene Lioanjie.

Q. That is the person you described as Andy, is that correct?
A. Sir?
Q. That is the person you have been referring to as Andy?

A. Yes.

Q. What did Andy do when you saw him at Pier 11 on Tuesday afternoon? You said he came with four men?

A. Yes.

Q. Did you notice who those four men were?

A. Well, I may have seen them at 42.

Q. You may have seen them or did see them at Pier 42?

A. Yes.

Q. You say you had seen them enter Pier 42?

A. I may have seen them up at Pier 42.

Q. But you don't know their names?

A. No, sir.

Q. And then what did Andy do?

A. He didn't do any particular thing more than them four guys came down on the boat. Andy said he wanted to go down to the *Victoria*.

[fol. 211] Q. Then what happened?

A. Then we took the loud speakers from the other boat and changed it on my boat.

Q. Yes.

A. And then we went down to the *Victoria*.

Q. Who went down to the *Victoria* with you?

A. The four men.

Q. Did Andy go to the *Victoria* with you?

A. No.

Q. Did Andy give you instructions as to where to go?

A. Not what I remember.

Q. But he told you to take these four men to the *Victoria*?

A. Yes.

Q. And then what did you do?

A. I went down to the *Victoria* with those four men.

Q. Was there any conversation on the way out to the *Victoria*?

A. No, not that I can remember. I was busy steering the boat.

Q. Did you hear any conversation? Were the four men carrying any picket signs?

A. No.

Q. Did they have any signs or placards at all?

A. Not at all.

Q. What did you do when you got out to the *Victoria*?

A. I laid off about five, six hundred feet and Andy started to talk in the loud speaker microphone.

Q. And what did they say on the loud speaker?

A. Oh, I couldn't understand that. That was in a foreign language.

Q. Did they say anything in English?

A. Not that I know of.

Q. You didn't hear them say anything in English?

A. I didn't hear that because I was under the machine, it was making noise.

Q. You say lay off the *Victoria*?

A. About five or six hundred foot.

[fol. 212] Q. Did you see the sailors of the *Victoria* watching your launch?

A. I seen the crew on the *Victoria* by the rail, yes.

Q. Was the loud speaker talking to the crew on the *Victoria*?

A. Yes.

Q. Then what happened?

Mr. Ostrin: If your Honor please, I move to strike the answer of the witness. He testified he did not know what the people on the boat was saying.

The Court: Strike it out.

Mr. Stratton: No further questions.

Cross examination.

By Mr. Ostrin:

Q. Mr. Andersson, on Tuesday afternoon when you went to the *Victoria* did your boat have a picket sign on it?

A. No.

Q. You say there were four men in the boat?

A. Yes.

Q. And Andy was not on the boat?

A. No.

Q. And you don't know what these people said when they got to the *Victoria*, do you?

A. No, I don't.

Q. Did they speak in English at all?

A. Not what I can remember.

Q. Did these men tell you where they were from?

A. No.

Q. You are sure that none of them carried any picket signs of any kind whatsoever?

A. No picket signs at all, no.

Q. How long did you stay by the *Victoria?*

A. I'll say from half an hour to forty-five minutes.

Q. Then after you had been there about 35 or 40 minutes, as you say, you went back to shore?

A. He asked me to take them to the pier, the south [fol. 213] side of 4 and 5 Staten Island. He went to make a telephone call.

Q. You didn't notice anybody leave the *Victoria;* did you?

A. No, sir.

Mr. Ostrin: That is all.

The Court: This Local 333 is a local of what Union?

The Witness: That is the United Marine Division of AFofL, CIO, Local 333. This boat was rented to this other Union.

The Court: That is all.

(Witness excused.)

Mr. Ostrin: At this point, if your Honor please, I move to strike the entire testimony of this witness on the grounds that the events to which he has testified took place after the issuance of the temporary restraining order.

The Court: Motion denied; exception.

Call your next witness.

Paolo Vagliasindi, residing on board the Steamship *Nassau*, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stratton:

Q. Captain, you have previously testified that you were the Captain of the S/S *Nassau?*

A. Yes, I did.

Q. And where is the S/S *Nassau* now?
A. Pier 42, north side.
Q. North River?
A. Yes, North River.
Q. And how long has it been there?
A. Since Friday the 13th.
[fol. 214] Q. Friday, you say?
A. Friday the 13th.
Q. And where had she come from?
A. From Nassau.
Q. From Nassau?
A. Yes.
Q. Did she have passengers on board?
A. Yes, she had.
Q. And will you tell us what happened to those passengers?
A. They disembarked.
Q. At what time?
A. About 10:00 o'clock because we docked 9:00 o'clock, a quarter to 9:00, and they disembarked about 10:00 o'clock after the Customs and Immigration were through.
Q. Were you scheduled to sail again?
A. 6:00 o'clock in the afternoon.
Q. The same day?
A. The same day, yes.
Q. Were you going to take passengers?
A. Yes, about 350.
Q. About 350?
A. Yes.
Q. And where were you scheduled to sail to, Captain?
A. To Nassau.
Q. Did the Masters come on board?
A. Yes; they did.
Q. Captain, when was the first time you saw a representative of the International Maritime Workers Union?
A. I met one representative, I mean before, many times on board. On the little deck about 11:00 o'clock, a quarter to 12:00, 12:00 o'clock; I don't remember exactly the hour.
Q. I don't mean this Friday, but when was the first time you ever saw a representative?
A. About two months ago.

Q. Will you tell us what happened on that occasion?

A. They came on board just because there were some crew members who refused to embark the provisions as [fol. 215] usual from the kitchen and from the dining room. They usually embarked the provisions and since they complained that they did have some pay for some hours in Genoa, because they loaded some cargo there one Sunday before leaving from Genoa, they didn't want to work before they had their payment of these hours.

Q. What did these representatives say to you then?

A. No. I held after that there were some representatives of the union on board and they came to me because I asked them on what duty and to ask them to call on me and they came in my quarters.

Q. Will you confine your testimony to what they said to you and what you said to them?

A. They said they would embark, just to speak with some people on board, with the crew members, because they were an international union; they take care of the crew members of the ships, and I told them, "Please, you can't do that if you don't have special permission from the Line. There is nothing that you can come aboard for. I will be very glad to have you come aboard, but I shall have to have special permission from the Line. I can't allow you to come aboard and, please, you ask the Line to give this permission."

And they thanked me and went away.

Q. Do you know the name of any of those men?

A. No, I don't. They told me the name. I see one of them over here. The seamen many times, they went away, but I can't remember the names now.

(The witness identifies a man in the courtroom.)

The Court: Identify that person.

[fol. 216] Mr. Ostrin: That is the same person, your Honor. May the record indicate the identification is of Mr. Lioanjie.

Q. And when was the next time that you saw representatives of the International Maritime Workers Union?

A. About every Friday. Now I can't remember exactly

the dates, but every Friday we came in port, they came on board, and every time they were accompanied by the officers to my quarters, and they had conversations and they told me that they will speak with the president of the Line, Mr. Berlingeri, if this was possible.

Q. Did they request permission to see the president of the line?

A. No, they didn't.

Q. What did they say about Mr. Berlingeri?

A. They tried to get in touch with him and they really did at last, I think, fifteen days ago in my presence. They did meet with Mr. Berlingeri, because I asked Mr. Berlingeri—no, no, then they met Mr. Berlingeri. It was when I had to disembark one crew member. He was sick. I didn't want to disembark this crew member, because my doctor, the doctor for our insurance here in New York, didn't say he was so sick to disembark. So I told him, "You don't disembark because the doctor says you are not sick to disembark."

At that time one of the representatives, I don't remember if it was him or another one, they came on board just to defend the right of this crew member to disembark, and I told them, "Please, you can't interfere with my Captain's job. I have the doctor on board. I have the insurance doctor. He said he is not so sick to disembark, so he will remain on board. But, anyway, if you will do something for him, you must ask the president of the Line." And [fol. 217] they did. I gave them the number of the Line's telephone.

They 'phoned to the president of the Line and the president of the Line called me and told me, "You leave this man do what he likes to do, and you send him with the union representatives and with our land agent." And I did.

And this man didn't come on board because I don't know what happened after, but he was sent to Italy. I don't know why.

Q. Was there another incident relating to a stewardess on board the *Nassau*?

A. Yes, the next week.

Q. Tell us your conversation with the union at that time?

A. The next week there was one stewardess I had to

disembark for indiscipline. And they came on board to me and asked me very kindly, "Captain, may we know the reasons for the stewardess's disembarkment?"

I told them "If I speak like a prince I can tell you something, but like a Captain, I have not to tell anybody what I do on board. This stewardess is already twenty days continuously making indiscipline on board. I can't take care of the boat." And I told them too, "She must be very grateful to the president of the Line who disembarked her and gave her the money to come back to Italy, because generally when somebody is disembarked for indiscipline, she must pay the voyage back to Italy. It is our contract."

And on that occasion these people met with the President of the Line, who was on board at the time, and he told me, "Please, I would like to speak with them." And we met together in Suite B, an apartment there, and we had quite a long speech, about half an hour.

[fol. 218] Q. These incidents were all before Friday, May 13th, were they not?

A. Before, yes, sir.

Q. Now, will you tell us about Friday, May 13th, after you disembarked the passengers that you brought back from Nassau? What happened?

A. Well, there was really a very heavy atmosphere on board. I couldn't understand exactly. And about 11:00 o'clock, 11:30, the purser called me and told me that some crew members refused to disembark the provisions on board like usual, you see. And after that the Chief Steward came to me and told me, "They say they are afraid of the longshoremen on strike, because there were already the pickets on the pier. So they stayed not to work, not for some reason, but because we are afraid the longshoremen were on the pier and were on strike and may do some harm, but if you agree with them, they are willing to work at noon.

Q. Did you go out on the bridge or on the pier?

A. What?

Q. Did you go out on your bridge and look at the pier?

A. No, I don't remember. Maybe yes, because I go many times on the bridge.

Q. And did you see the picket line?

A. Oh, yes.

Q. Will you tell us what you saw?

A. I see some men with some written sign on the back and on the front of the body, walking around outside the pier.

Q. Outside Pier 42?

A. Yes.

Q. Did you see what the signs said?

A. No, it was impossible from—I could with the glasses, but I didn't, though I saw "Steamship Nassau."

Q. You say "Steamship Nassau" on the sign?

A. Yes.

[fol. 219] Q. Were the members of the crew picketing?

A. No.

Q. They were not?

A. No.

Q. What happened next, Captain?

A. Next after that, generally from 12:00 o'clock until 4:00 o'clock—4:00 o'clock is the hour we start embarking our passengers. We leave the men free and they went ashore. Before this I met this union representative, and we were quite friendly, you see, because I met him every Friday, I asked him, "What's the matter this morning? Why this strike of longshoremen, because they interrupt to embark the cargo, because we start about 9:30 to embark cargo, and 10:00 o'clock it was over."

The Court: What day was this?

The Witness: This day, the 13th, which is Friday, the 13th, because the longshoremen—

Q. You say at 10:00 o'clock it was over. What do you mean by that? Was all the cargo loaded?

A. No. It was ordered work, because they refused to go on with the work. We had to embark about 70 tons of cargo. We embarked only about two tons of frozen food and about ten tons of general cargo, and after they refused to go on with the embarking of the cargo because of the pickets.

Q. I think that is 17 tons of cargo?

A. Seventeen. We had to embark 17 tons.

Q. And you got 12 tons on board?

A. Yes.
Q. And they refused to load more?
A. They refused to load more, yes.
Q. What happened next?
A. Four o'clock everybody—I asked, "What's the matter." He answered me: "Don't worry, Captain. Everybody will work quiet on board."

[fol. 220] Mr. Ostrin: "Don't worry, Captain"?
The Witness: "Don't worry, Captain. Everybody will do his job."
Mr. Ostrin: Who said that?
The Witness: The union representative.
Mr. Ostrin: Did you know who he was?
The Witness: Yes; if I saw him I could recognize him, but I don't see him here.

Q. Is he in the courtroom now? Do you see him?
A. No, in the court I don't see him.

By Mr. Stratton:

Q. What else did he say? Did he say anything more?
A. No.
Q. Is that the end of the conversation?
A. Yes.
Q. What happened in the afternoon then?
A. In the afternoon a few people from our kitchen embarked. The Chief Steward, the Head Chief Steward, and somebody else, embarked the provisions, the supplies, the food supplies, but they didn't ask the crew members from the dining-room to do that too, because they were very afraid.

Mr. Ostrin: I object to that, that they didn't ask. I think it is hearsay.
The Court: Try to find out what was said.

Q. Captain, who was it that would not help the Chief Steward, do you know?
A. The men of the morning. I told them in the morning but some people refused to embark the supplies, because they were afraid of the longshoremen that were on strike.

So the Chief Steward didn't ask more of them to help him, but he embarked the provisions. He, his assistant, and the other two men helped them.

[fol. 221] Q. They embarked the provisions themselves?

A. Yes.

Q. Then what happened?

A. 4:00 o'clock everybody came back on board.

Q. By everybody you mean the crew?

A. Everybody from the crew, yes, who were on leave for three or four hours.

Q. Did they have a right to be ashore to 4:00 o'clock?

A. Yes.

Q. But then they were required to come back on the ship?

A. 4:00 o'clock, because we started to embark passengers. So they are required to come back 4:00 o'clock.

Q. And then they are not permitted to go ashore again after 4:00 o'clock?

A. After 4:00 o'clock, no, except with some special permission, you know, but nobody asked me for permission and nobody went ashore till the strike was spread.

Q. Tell us from 4:00 o'clock on what happened?

A. From 4:00 o'clock to 5:00 o'clock everybody did his duty.

Q. And what happened?

A. The passengers came on board. They helped the passengers to go in their cabins, to find the cabins, to carry the baggage, because the passengers carried the baggage from the end of the pier on board because the longshoremen were on strike and, the porters, too, because they were obliged to carry their baggage to the ship.

Q. The longshoremen and porters did not bring the baggage on board the ship, is that right?

A. No. The longshoremen usually take the baggage on board but this day they didn't, so the passengers brought their baggage on board. On board are sailors or waiters who help them to bring the baggage in the cabins.

[fol. 222] Q. And that is what happened between 4:00 and 5:00 o'clock?

A. Nothing.

Q. That is what happened, what you just told us?

A. Yes, from 4:00 o'clock to 5:00 o'clock everything was smooth.

Q. And what happened 5:00 o'clock?

A. 5:00 o'clock I was just near the Chief Purser's desk, because I had to phone to Mr. Wolfson that everything was going well so far and the ship's purser came to me and told me: "Captain, all the stewards department is going ashore. All the members of the stewards department are going ashore."

Q. Then what did you do?

A. So I rushed with the Chief Purser on the deck and I went ashore through the gangway. There were already about 100 people ashore.

Q. 100 of your crew?

A. Of my crew, yes, just near the gangway.

Q. How many men were in your crew all told?

A. 208.

Q. And when they went ashore was that by your order?

A. Of course it is by a special order that they can go ashore.

Q. Then what did you do?

A. I came ashore and just asked them to come back on board because I told them Mr. Berlingeri promised that he will be here next Friday to sail with us and to stay all the cruise along with us just to hear what you want and to get in contact with every one of you that wants to speak with him just to reach an agreement, but in the meanwhile somebody from the men were there and started to scream: "We don't want to speak with Mr. Berlingeri. We don't want more promises. We want facts and the fact is we have strong Unions now."

[fol. 223] Mr. Ostrin: What is that?

The Witness: "We have too many promises they didn't maintain. How we want all the facts and these facts we will have through the Union. We don't want to speak to you, Captain. We are sorry for you but we won't speak with you." And they rushed away from the pier, to the end of the pier.

Q. And did they come back on board?

A. No, they didn't.

Q. And then what happened, Captain? Did you go back on board?

A. Yes, I did go back on board and I went there just to phone to the company. I did come back on board and after this telephone call I went all around the ship and there was somebody still on board. They were all going ashore because I heard that somebody from my crew members and somebody from the Unions were on board just to convince everybody to leave the ship.

Q. And how many of the crew stayed?

Mr. Ostrin: You say you heard some of the Union members?

The Witness: Yes, I heard. I didn't see them.

Mr. Ostrin: I move that be stricken.

The Court: Strike it out.

Q. And how many crew men remained on board?

A. Well, I made this tour and there were about 50 on board. Some just watched, some were just going around.

Q. What about your crew?

A. They left during this few minutes I was downstairs to phone.

[fol. 224] Q. And what happened at that time, Captain?

A. 6:00 o'clock we couldn't leave because we had no more sufficient crew on board.

Q. 6:00 o'clock was your scheduled hour to leave?

A. 6:00 o'clock was our scheduled time to leave.

Q. And were you all ready to sail?

A. Yes.

Q. And other than the fact that the crew was not aboard?

A. Yes.

Q. And what happened then?

A. Next I phoned to the president of the Line—I am sorry, the president of the Line was not in New York, he was on board the *Victoria*—Mr. Wolfson.

Q. I don't want that telephone conversation. Were the passengers still on board?

A. The passengers were on board, and since the passengers were still on board I asked the Union representative to convince some crew members to come back on board just

to feed these passengers because 7:00 o'clock was supposed to be the first sitting dinner.

Q. Did they come back on board to feed the passengers?

A. No, they didn't.

Q. And what happened to the passengers?

A. 8:00 o'clock I told them I am sorry, I can't serve dinner because we have no crew members on board. So I allowed them to go ashore and have some sandwiches because I delayed the departure till 10:00 o'clock. If an agreement will be reached at that time between the Agency and the representatives of the Unions, because they were in contact already, I delayed it.

Q. And did the passengers go ashore?

A. Yes, many of them and they came back at 10:00 o'clock.

Q. Did they spend the night on the boat?

A. Yes. At midnight, when there was a meeting—I [fol. 225] wasn't present—between our president of the Agency and Mr. Wolfson and the Union representatives.

Q. I am not inquiring about that. You were not present Captain?

A. No, I was not.

Q. How long did the passengers stay on board?

A. When I told them that the cruise was cancelled, about midnight.

Q. You told them at midnight?

A. At midnight I told them the cruise was cancelled but they were allowed to remain on board for the night and go ashore the day after. And some did, about 70 of them.

Q. And the cruise had been in fact cancelled, had it not?

A. What?

Q. The cruise had been cancelled, hadn't it?

A. Yes.

Q. And you told the passengers their passage money would be refunded?

A. Yes, sir.

Q. Had their passage money been refused?

A. Well, it was the Agency's job. I think in the same night somebody had been refunded; I don't know.

Q. Captain, are any of the crew members aboard your ship now?

A. On board my ship?

Q. Yes.

A. Yes. They usually come on board to sleep, to wash, to change, but they don't eat on board. They come and go. I don't forbid them to come on board.

Q. And is food available for them if they will cook it?

A. Yes. I told them many times, I asked the representative of the crew, I asked them many times to come back on board to have food on board and they told me: "Wait until we ask everybody." They went ashore and they said they [fol. 226] didn't want to come back on board to have dinner and lunch.

Q. So they ate ashore by choice?

A. Yes, they ate ashore.

Mr. Stratton: No further questions.

Cross examination.

By Mr. Ostrin:

Q. Captain, you said that you met representatives of the International Maritime Workers Union sometime before May 13th?

A. Yes, I did.

Q. And one of the men whom you met was Mr. Lioanjie?

A. Yes.

Q. You pointed him out?

A. Yes.

Q. Did you meet the man who sits alongside of him?

A. I couldn't say yes. I didn't notice so far as seeing him.

Q. This was about how many weeks before May 13th, Captain?

A. How many weeks?

Q. Yes.

A. About two months.

Q. About two months?

A. Yes.

Q. And the first time that you saw them was in connection with what particular incident, do you recall?

A. It was at the same time they were aboard for some claim from the boys from the kitchen.

Q. It was a claim for overtime?

A. No, no, they didn't want to embark as usual the provisions, the supplies, because they were saying that the line has not maintained the promises given them in Genoa before leaving.

Q. The promises as to what?

A: In Genoa they had two days work they were not supposed to do but since we were in quite a hurry before leaving they offered themselves to work to embark some provisions, to paint something.

[fol. 227] Q. You say some of the men in the kitchen complained because they did more work in Genoa than they were supposed to do?

A. No, because they did willingly this work but they were supposed to be paid and after about one month, two months we left Genoa and they didn't get this pay.

Q. In other words, the claim was that they did not get paid for certain work which they did in Genoa, is that right?

A. Exactly.

Q. And did you know of the existence of this complaint?

A. Yes. I was convinced they were already paid and they came down and I asked them. "I am sorry." I was convinced they were paid but, I said, "Of course you will be immediately."

Q. In other words, they had not yet been paid?

A: Not yet, exactly.

Q. But they were going to be paid?

A. Exactly. Not yet been paid.

Q. And Mr. Lioanjie and another man from the Union came up and talked to you about that?

A. No. I knew they that they were on board and they came to me just because I asked them to come in my quarters, and they did.

Q. You asked Mr. Lioanjie to come aboard?

A. Not on board, in my quarters. They were already on board.

Q. Was this the first time you had ever seen Mr. Lioanjie?

A. As far as I remember.

Q. And he was there—let me understand this clearly—he and the other man from the Union were there concerning the complaint of some—

A. No, I don't know. Maybe yes.

Q. You don't know?

A. I don't know.

Q. But you knew that about that time there was a complaint?

A. Exactly. So I connected the two things, but I can't [fol. 228] say. They were falling in.

Q. At that time I think you said to Mr. Lioanjie and the other representative of the Union that you wanted them to obtain permission from the company?

A. Yes, the permission.

Q. And did you tell them who they were to see at the company to get permission?

A. Yes, Mr. Berlingeri or Mr. Wolfson.

Q. Either Mr. Berlingeri or Mr. Wolfson?

A. Yes.

Q. You told them that?

A. Yes.

Q. And did you tell them the address? Did you tell them where to go?

A. I don't remember if I gave them the address but maybe yes.

Q. But you told them that they could talk to either one to get permission?

A. Yes.

Q. And did they then leave?

A. Yes.

Q. No problem with them?

A. No problem.

Q. They acted courteously?

A. What?

Q. They acted courteously?

A. Very.

Q. Did they say anything to you about their representing the people on your ship?

A. No, they said they had already met representatives on the *Victoria*.

Q. They said they had representatives on the *Victoria*?

A. Yes. And they will have very soon on board the *Nassau*, too. They will have on board the *Nassau*, too.

Q. And this they told you before you asked them to get permission, is that right?

A. Well—

Q. About that time. I think you said on your direct examination that you gave them the telephone number of the company?

A. Yes. If I didn't give them at this time I gave them another time certainly.

[fol. 229] Q. What number did you give them, do you know? Would it be the number which is located at 39 Broadway?

A. Yes.

Q. And that is the number that you used?

A. Yes.

Q. When you wanted to talk to Mr. Wolfson?

A. Yes. It is written over there near the telephone. There is a tablet with all numbers.

Q. And that is the number you used when you either want to call Mr. Wolfson or Mr. Berlingeri, is that right?

A. Yes.

Q. Did you see the two gentlemen that day after they left the ship? This is a few weeks before?

A. Yes.

Q. Did you see them? Did they come back that day?

A. No, I don't know. If they came back I don't know.

Q. When did you see them the next time? Would it be the next Friday?

A. About every Friday, you see, they come aboard.

Q. From that point on you saw them every Friday?

A. Yes, every Friday, about.

Q. When they came aboard the next time did you know whether or not they had permission from the company to go aboard?

A. I asked them because they went in my quarters and they said to me, no, we have not, and so I asked them, please, I don't care if you go around but I will accompany you. And they told me, no, please, you don't bother. We don't want the Captain of the ship to be disturbing us. And I gave them an officer to accompany them.

Q. You gave them an officer to accompany them?

A. Yes.

Q. And when they made the rounds of the ship?

A. Yes.

[fol. 230] Q. Did you have any conversations with them on that day other than what you have told us?

A. All the time I had conversations with them.

Q. What did you talk about?

A. Well, about the condition of the—they were attempting to defend the right of these people on the *Victoria* and the *Nassau*.

Q. In other words, they told you that they were there to represent the crews of the *Nassau*?

A. Yes.

Q. And the *Victoria*?

A. Not to represent, to defend the rights.

Q. To defend their rights?

A. Yes.

Q. To handle their grievances or complaints?

A. Yes.

Q. And what did you say?

A. That I said I would inform the Line.

Q. And did you inform the Line?

A. Yes, I did.

Q. Who did you talk to?

A. Mr. Berlingeri.

Q. And did you at any time talk to Mr. Wolfson about the same thing when Mr. Berlingeri was not there?

A. Maybe yes. I don't remember exactly but maybe yes.

Q. But is possible you talk to Mr. Wolfson as well as to Mr. Berlingeri?

A. Yes.

Q. And this was about the complaints of the people who were working on the ship?

A. Yes.

Q. Did you know the nature of the complaints of the people who were on your ship?

A. About the wages.

Q. They complained their wages were too low?

A. Too low.

Q. Did they complain about anything else?

A. I heard just this week somebody was complaining because the Captain was too rigid.

[fol. 231] Q. Rigid?

A. Too rigid.

Q. Too strict?

A. Too strict about some permissions. For instance, he didn't allow them to go ashore when she is entering Nassau when the passengers were going ashore, and I do want them to come back with the last tender, but it is the rule of every passenger ship the crew cannot go ashore with the first tender.

Q. In other words, they complained about—

A. Some strictness.

Q. Your being strict with respect to shore leave?

A. Shore leave, yes.

Q. And did they complain about overtime?

A. They didn't; never to me. I heard just this week now.

Q. Did you hear any complaint about overtime, not getting enough pay for overtime?

A. Yes, they did.

Q. And these people, this Mr. Lioanjie and the other gentleman from the I.M.W.U. told you that they were there to defend these people in connection with their claims, is that right?

A. Yes.

Q. And you talked to them about it?

A. Yes, sir. I told them that I will try to let them contact Mr. Berlingeri and I did one week, and I think he was here, too.

Q. I am talking now about sometime before May 13th. Was he on board the ship when Mr. Lioanjie and other representatives of the Union came aboard?

A. Mr. Berlingeri?

Q. Yes, on some Friday?

A. Yes.

Q. This would be before the 13th?

A. Yes, two times, as far as I remember.

Q. There were two times that you remember before the 13th that Mr. Lioanjie and another man from the I.M.W.U., who is not here in court today, and Mr. Berlingeri [fol. 232] spoke to each other?

A. Yes.

Q. And did they speak to each other in your presence?

A. Yes.

Q. And was this in your quarters?

A. One time in my quarters, one time in Suite B.

Q. And what did they talk about? What was the talk? What was the discussion?

A. The time in Suite B was about the firing by the Captain of the Stewardess.

Q. There was one time they talked about the firing of the Stewardess?

A. Yes.

Q. And this was about how many weeks before May 13th, Captain, do you remember, about?

A. About three weeks, about four weeks; I don't know. Four weeks or so.

Q. About three to four weeks before there was a Stewardess that was fired by you, is that right?

A. Yes.

Q. And where was the Stewardess fired? In New York?

A. Yes.

Q. And is this where the firings always take place, if they do take place at all?

A. Generally, yes.

Q. And if there is a firing it takes place in New York, is that right? If there is a person to be fired he is fired in New York, is that right?

A. Generally. We could fire in Nassau, too, if there is something very, very important.

Q. But as a rule it is in New York?

A. New York, yes.

Q. And is the reason for that that the voyage starts in New York and finishes in New York? Is that the reason for it?

A. I don't think it is the reason. The cruise starts from New York and finishes in New York.

[fol. 233] Q. Well, that is the fact, isn't it?

A. Yes.

Q. The cruise always starts in New York and always finishes in New York?

A. Yes.

Q. This Stewardess was fired because of insubordination or was it for inefficiency or what?

A. Many continuous indisciplines.

Q. She was continually being disciplined, is that right?

A. Yes.

Q. In other words, this girl was fired because she was constantly being disobedient, is that right?

A. Dis?

Q. Disobedient?

A. Disobedient, yes.

Q. The two representatives of the Union spoke to you and to Mr. Berlingeri about this dismissal?

A. Yes.

Q. And what was done about it? Anything?

Q. No, she was disembarked because I told them: "I will speak to you as a person but not like Captain, because I don't want anybody to interfere with my job. If I disembark somebody not even the President of the Line can say anything about it."

Q. Captain, do you know that under contracts with Unions that the Captain does not have the last word in firing a person; that the Union can challenge the Captain's right to fire a person?

A. No, no.

Mr. Stratton: Objected to.

The Court: Objection sustained.

Q. And did they discuss anything else on that occasion?

A. On this occasion Mr. Berlingeri asked them "Do you think that we are glad to disembark somebody? For us it means about $500, $600 or $700 every time to disembark [fol. 234] somebody, so if we are not forced to disembarked neither the Captain nor myself will disembark nobody. And we have the right, because of the contract, to disembark somebody, but since the crew is very well on board we try to avoid this."

Q. According to what contract, Captain, do you have that right?

A. Which the Incres Line prepared.

Q. With whom?

A. With the crew.

Q. With each seaman; is that right?

A. Of course.

Q. You are referring to this contract (indicating)?

A. Well, it is in the entire contract. They signed this one but it is not the complete contract (indicating).

Q. The other things is that book that we were talking about?

A. Yes, the book.

Mr. Ostrin: Have you produced that agreement to which Defendants' Exhibit C refers?

Mr. McAllister: I am sorry, your Honor, that document is in Italian and there is no English translation available at all.

I have been informed by the company that it is based on the Italian National Labor contract.

Mr. Ostrin: I object to what it is based upon. I think at least we are entitled to see what this contract is, the title, the caption, and with who, if anybody, it was made.

The Court: Do you have it?

Mr. McAllister: I don't have it here, your Honor, but we offer to produce it when we find it. The document will be made available. At that time we will object to its relevancy.

[fol. 235] Q. You say they had met with Mr. Berlingeri on another occasion?

A. Yes.

Q. I think you said twice?

A. Yes.

Q. When was the other occasion in relation to May 13th? Was it a week before?

A. More than a week because the week before Mr. Berlingeri—one week before maybe, yes. Before he left with the *Victoria;* yes.

Q. Did they meet with you and Mr. Berlingeri in your quarters on that occasion?

A. Yes.

Q. And what was discussed at that meeting, Captain?

A. About improvement in the wages and Mr. Berlingeri asked them will they be satisfied with the Italian contract,

and your representative answered, "I think so." That will be after the contract.

Q. Do I take it then that the wages on the Italian contract were—

A. Higher.

Q. Withdrawn, and I will start it all over again.

Q. Do I take it that the wages on the standard Italian contract were higher than the wages that your crew people were getting?

Mr. Stratton: Objection, your Honor.

The Court: Overruled.

The Witness: Shall I answer?

The Court: Yes.

A. Yes, they are.

Q. They are higher. And Mr. Berlingeri asked these representatives of the union whether they would be satisfied in getting the wages of your crew members brought up to the wages of the people who worked under the Italian contract?

A. Yes.

[fol. 236] Q. And they said what?

A. Mr. Berlingeri said: "I think we can reach an agreement on this basis."

Q. And reach an agreement with whom? With the International Maritime Workers Union?

A. He didn't say that.

Q. Well, he was talking to the representatives of the union, wasn't he?

A. Maybe he intended with the crew members.

Q. Never mind that he intended.

A. I don't know. He said that.

Q. Let us take this step by step. You say that at this meeting in your quarters at which you and Mr. Berlingeri were present, and also present were Mr. Lioanjie and another member of the union; right?

A. Yes.

Q. In the course of this conversation, as I understand your testimony, Mr. Berlingeri asked Mr. Lioanjie and another man whether he thought the members of the crew would be satisfied if they got the same wages that the peo-

ple working on Italian Line ships or Italian ships get under the Italian contract?

A. Yes, sir.

Q. And he asked that question of Mr. Lioanjie and the other man?

A. Yes.

Q. And Mr. Lioanjie and the other man said, "I think so," or something like that?

A. Yes.

Q. What else was said at that meeting, Captain?

A. Well, the meaning of the discussion was this.

Q. That was all?

A. Yes.

Q. And did Mr. Berlingeri say, I think you said, but I am not sure, did he also say "Well, then I think we can reach an agreement on that"?

A. Yes.

[fol. 237] Q. Captain, the Italian agreement is an agreement which is in force for all Italian seamen who work on Italian flag ships, isn't that right?

A. Yes.

Q. And it is limited only to Italian flag ships, is that right?

A. Yes.

Q. And it has no application to a ship such as yours which flies the Liberian flag, does it?

A. No.

Q. It does not apply to your ship, does it?

A. No, no.

Q. When was the next time that you saw these people?

A. The 13th.

Q. Would that be the 13th?

A. Yes.

Q. I think you said, and correct me if I am wrong, Captain, that you noticed something unusual aboard your ship before she docked, is that right?

A. Not before she docked, after she docked.

Q. Was there anything before she docked?

A. No.

Q. You said something about there was a heavy atmosphere; I think those were the words you used?

A. After we docked.
Q. After you docked there was a heavy atmosphere?
A. Yes, because I heard the pickets said—
Q. What?
A. There were the pickets and I saw this.
Q. There were the pickets?
A. The longshoremen didn't want to work on the cargo, but for half an hour only.

Mr. Ostrin: May I have this marked for identification, please.

(Defendants' Exhibits D and D-1 marked for identification.) (Picket Signs)

[fol. 238] Q. Captain, I show you Defendants' Exhibits D and D-1 for identification and ask you whether these are the picket signs that you saw?
A. The sides, yes.

Mr. Stratton: May I point out, your Honor, that these picket signs say it is the "M/V *Victoria*."
Mr. Ostrin: I know. Aside from the name Victoria.

Q. Aside from the name *Victoria*, did you see a sign like this, but which had the name "*Nassau*" on it instead of the word "Victoria"?
A. I think it was on the top side, S/S. *Nassau*, so far as I remember.
Q. But other than that, the sign was the same?
A. I can't say because I didn't read it exactly.
Q. You came down ashore, did you not?
A. What?
Q. Did you leave the ship sometime on the 13th?
A. No, I didn't ever leave the ship.

Mr. Stratton: Your Honor, we have no objection to this.
Mr. Ostrin: Then I offer this in evidence with the stipulation that this is the picket sign for the *Victoria*. The stipulation is that the picket sign for the *Nassau* was identical except for the name of the vessel, is that so?
Mr. Stratton: We will so stipulate.

(Defendants' Exhibits D and D-1 for identification, picket signs, marked in evidence.)

Mr. Ostrin: Does your Honor care to see it?

[fol. 239] The Court: Just hold it up.

Mr. Ostrin: There is a different legend on each side, your Honor (illustrating).

May I, with your Honor's permission, read the signs into the record?

The Court: Yes.

Mr. Ostrin: The sign is a sandwich type sign. It is worn by a picket, with one side in front of him and one behind him.

One side of the sign reads as follows:

"We want better wages and working conditions for M/V. *Victoria* seamen. This picketing is only against the M/V. *Victoria*. We have no dispute with the other employer.

On the reverse side:

"M/V. *Victoria* unfair. Refuse to recognize International Maritime Workers Union. This picketing is only against the M/V. *Victoria*. We have no dispute with any other employer."

Q. Were the picket signs visible as the vessel approached the dock?

A. No, Friday.

Q. On Friday, as you came up to the dock. When for the first time were you able to see the picket signs?

A. When I realized that the longshoremen were not working any more to load cargo.

Q. Is that when the vessel was fast to the dock?

A. Yes, about 10:30, 11:00 o'clock, something like this.

Q. And how many pickets did you see, Captain?

A. I couldn't say.

Q. Were there a hundred?

A. No. I could see about two or three; I don't know.

[fol. 240] Q. You saw about two or three, is that right?

A. Because from the bridge it is impossible to see outside the dock.

Q. You didn't see a mob of pickets; did you?

A. No.

Q. And were the pickets behaving or walking in an orderly manner?

A. Walking up and down.

Q. So far as you were able to see?

A. Walking up and down.

Q. Were they doing any shouting that you know of?

A. No, but we are far away from the end of the pier.

Q. If you don't know, you don't know.

A. I don't know.

Q. You didn't hear any shouting, did you?

A. I didn't hear.

Q. Did you notice any fighting or any disturbances?

A. I didn't.

Q. Would you say that everything was peaceful and orderly, so far as you were able to see? So far as you were able to see?

A. Yes.

Q. Everything was peaceful and orderly, right. You say as the pickets became visible you noticed that there was a heavy atmosphere aboard the ship, is that right?

A. After the longshoremen came to strike the ship.

Q. You don't know whether the longshoremen went on strike, do you?

A. Yes, because they refused to load the cargo.

Q. All you know is that the longshoremen didn't load the cargo, is that right?

A. I knew that they were not in work and about the pickets.

Q. If you know, isn't it more correct to say that the longshoremen noticed the picket line; that they refused to cross the picket line?

A. Sure.

Q. That is more accurate, isn't it?

A. Exactly.

[fol. 241] Q. And when it became apparent that the longshoremen would not cross the picket line, and would not work the ship, was it at that point that you noticed a heavy atmosphere aboard the ship?

A. Yes, because I was told already when the ship's

purser came to me that there were some dining-room stewards not willing to embark the provisions as usual.

Q. You mean by embarking the provisions, taking the provisions off the boat, off the ship?

A. From the shore on board. Load. Load in its place.

Q. And did you hear anything else?

A. No.

Q. This picket line was outside of Pier 42?

A. Yes.

Q. It was not directly in front of the gangway, was it?

A. No, no.

Q. About what time of the morning, Captain, did you see the union representatives?

A. About noon.

Q. About noon?

A. I think some minutes before noon.

Q. Pardon?

A. Some minutes before noon.

Q. And one of them was Mr. Lioanjie?

A. I don't think so.

Q. No?

A. I saw only one.

Q. You only saw one. If I were to mention his name, would you recognize it?

A. It is very difficult.

Q. Suppose I try.

A. Yes, do try.

Q. Could it have been a Mr. Theodore Ortez Chevaketz?

A. They told me their names many times, but, you see, I didn't pay attention.

Q. We are trying to get them in court, Captain. I don't know whether we can reach them while you are on the stand or not. In any event you say there was one person, [fol. 242] one representative of the International Maritime Workers Union. Had you seen this person before?

A. Yes.

Q. And you knew that he was a spokesman for the International Maritime Workers Union?

A. Yes.

Q. Because he told you that on other occasions?

A. Yes.

Q. Is he the man whom you saw on other occasions with Mr. Lioanjie?

A. Yes.

Q. And is he the man that met with you and Mr. Berlingeri in your quarters on Tuesday?

A. Maybe. I couldn't say—

Q. Did you speak with this man?

A. Yes, I did.

Q. And you asked him what was going on?

A. Yes.

Q. What did he say to you?

A. He said, "Don't worry, Captain," because I told him the dining-room stewards won't work, and he told me, "Don't worry, Captain, we are just coming from the dining-room and they will work now."

Q. And what happened then?

A. He went away.

Q. Did you talk to him about other things?

A. No.

Q. Did he tell you that the union represented a majority or claimed to represent a majority of the crew members?

A. No.

Q. You never heard him say that to you?

A. Not that time.

Q. What?

A. Not at that time.

Q. Not at that time?

A. No.

Q. Did you hear him say that at another time?

A. Another time they said that they hoped the vessel would have the majority of the crew members sign the pledge cards for the union.

[fol. 243] Q. When was that? How many weeks before?

A. About one month ago, maybe.

Q. About a month before they said they hoped to have a majority?

A. Yes.

Q. Captain, at this time the members of the crew were not represented by any other union, were they?

A. They were represented by?

Q. By any other union, were they?

A. No, not as far as I know.

Q. As you said, there was no contract with the Italian union and they were not represented by the Italian union?

A. Well, the contract was approved by the Italian union.

The Court: The contract was what?

The Witness: The contract was approved by the Italian Union.

Q. How do you know that, Captain?

A. The Line told me.

Mr. Ostrin: I move to strike that as hearsay.

The Court: What was your answer? What did you say?

Mr. Ostrin: That the Line told him.

The Witness: Back in Genoa, not here.

Mr. Ostrin: I move that that be stricken.

The Court: I will allow it to stand.

Q. How long did this representation of the International Maritime Workers Union stay aboard the ship on Friday the 13th?

A. I don't know exactly. I just met them on the deck.

Q. Did you then walk away and leave them alone?

A. He walked away.

Q. He walked away?

A. But I think he went ashore.

[fol. 244] Q. You don't know where on the ship he went to, do you?

A. Where?

Q. Where on the ship he went, do you?

The Court: Who is "he," counsellor?

Mr. Ostrin: The representative of the International Maritime Workers Union.

A. He told me that he was coming from the dining-room.

Q. Captain, do you recall having made an affidavit in this case?

A. Yes.

Q. And is this your affidavit?

A. Yes.

Q. Do you recall having said, Captain, that early in the morning (referring to May 13th) one of the officers was told

that whispered call from the deck was directed toward the ship, urging the crew not to perform any work on the ship—

A. Yes, somebody from the dining-room.

Q. Just a minute. Any work, that the ship would not sail because it would be picketed?

A. Yes.

Q. And you stand on that statement, don't you?

A. Yes.

Q. I misread one word, Captain. It was not a whispered call from the deck, it was a whispered call from the dock.

A. From the dock.

Q. From the dock where representatives of the International Maritime Workers Union were?

A. I don't know who. It was reported to me.

Q. That there was a whispered call from the dock? That is where?

A. To where someone was working on board.

Q. Somebody was working on board?

A. Yes.

Q. The crew members at that time were working on the ship?

A. Yes.

[fol. 245] Q. None of your crew members were off the ship at that time?

A. No.

Q. And that there was a whispered call from the dock directing them, the members of the crew, or urging them not to perform their work because the vessel would not sail?

A. Yes.

Q. And you stand on that testimony, is that right?

A. Yes.

Q. Captain, is it correct to say that at all times after the strike occurred when the men refused to work that there were adequate personnel to insure the safety of the vessel while she was in port?

A. Yes.

Q. In other words, you had your watchers, your engine watch and your deck watch; is that right?

A. Yes. Only the day we had passengers on board there were not enough.

Q. And did you receive the co-operation of the Union on that score?

A. Yes.

Q. In other words, when you asked a representative of the Union sometime during the afternoon of the 13th to provide you with enough men to man the watches for safety purposes they got you those men?

A. In the evening, not in the afternoon.

Q. They finally got you those men?

A. When I asked them.

Q. I beg your pardon?

A. When I asked them.

Q. When you asked them they respected your request, didn't they?

A. Yes. They put some more men. I asked, you see.

Q. What?

A. I asked for many others but they put some men when I asked for them.

Q. I don't get that last part.

A. I asked, for instance, 20 people. They gave me 12.

[fol. 246] Q. You mean for the stewards to help serve the passengers?

A. No, no, no. For the deck department, for the engine department. I also asked for the orderly just to take care of something and they refused me.

Q. Who refused you?

A. Well, they didn't send me. They gave me a note: "We know the rules. It isn't for you."

Q. They gave you a note and they said these are all the people that you need?

A. Yes.

Q. And did they give you those people?

A. Yes, they did.

Q. And then you were talking to the representatives of the International Maritime Workers Union, is that right?

A. Yes, I spoke with them at night.

Q. Wasn't that sufficient to satisfy the safety requirements of the vessel?

A. While she was in port, yes.

Q. While she was in port?

A. Yes.

Q. So they gave you enough people to satisfy the safety requirements of the Coast Guard for the vessel while she was in port, is that right?

A. Yes.

Q. At what time was it on the 13th that the people started to leave the ship?

A. About 5:00 o'clock.

Q. The crew members?

A. 5:00 o'clock, about.

Q. About 5:00 o'clock, and did you follow them?

A. Yes, when I knew.

Q. What?

A. When I knew then.

Q. When you learned what you followed them?

A. Yes.

Q. And where did you catch up with them?

A. Near the gangway.

Q. Near the gangway?

A. Yes.

[fol. 247] Q. On the ship?

A. No.

Q. Off the ship?

A. On the pier.

Q. In other words, you got off the ship and down the gangway?

A. Yes.

Q. And you caught up with them at the Pier?

A. Yes.

Q. And did you speak with them?

A. Yes.

Q. What did you say?

A. I told them already—

Q. What did you say?

A. Shall I tell you?

Q. Yes, please do.

A. Please, you come back on board because Mr. Berlingeri promised me to come on board the *Nassau* next Friday just to discuss everything with everybody of you and just to reach an agreement.

Q. You knew what they were looking for was an agree-

ment between your company and the International Maritime Workers Union, is that right?

A. Yes.

Q. You knew that?

A. They told me, yes.

Q. They told you that. They told you that they wanted to be represented by the International Maritime Workers Union, is that right?

A. Yes.

Q. And you then asked them to be patient and wait until Mr. Berlingeri would come back?

A. Yes.

Q. And do what?

A. And reach an agreement with them.

Q. And did you reach an agreement with them?

A. Yes.

Q. When you say "with them," with the International Maritime Workers Union?

A. No, with the crew.

Q. And what did they say?

A. They answered, "We don't want more promises, we want to reach an agreement. You speak now only through the Unions."

[fol. 248] Q. You speak now only what?

A. You speak now only to the Unions.

Q. They said to you you can speak now only to the Union?

A. Yes.

Q. Did you understand them to mean by that that they could only speak to the Union for their interests, is that right?

A. Yes. The Line spoke to the Union.

Q. That is what you understood them to say?

A. Yes. Two or three screamed like this.

Q. Did you hear anybody say anything different than that?

A. No, everybody hollered it.

Q. And they made it plain to you they wanted representation by the International Maritime Workers Union, they wanted a contract with the International Maritime Workers Union?

A. They didn't say that. They said, we speak only through the Unions.

Q. Speak through the International Maritime Worker's Union?

A. Through the Union.

Q. And you said to wait until Mr. Berlingeri comes back?

A. Yes.

Q. So until 4:00 o'clock is it your testimony that everybody did his duty?

A. Yes, until 5:00 o'clock.

Q. Until about 5:00 o'clock?

A. Yes, because from noon to 4:00 o'clock they were on leave. They come on at 4:00 o'clock and they did the job till 5:00 o'clock.

Q. I think you said about 5:00 o'clock you were standing near the purser's desk?

A. Yes.

Q. And you telephoned Mr. Wolfson?

A. Yes.

Q. And what did you say to Mr. Wolfson?

A. The situation was quite good because everybody was doing his duty.

Q. And when you say the labor situation, you have in mind—withdrawn.

[fol. 249] When you said "The situation" you had in mind the labor situation, didn't you?

A. Yes.

Q. And you were calling Mr. Wolfson to report to him on that, is that right?

A. Yes.

Q. And at that point is when you heard or someone told you that the members of the crew were getting off the ship: right?

A. You mean more or less?

Q. Yes, about that. What time was it when you told the passengers to go ashore?

A. To eat?

Q. For dinner, yes.

A. About 8:45.

Q. And what else did you tell them?

A. To come back 10:00 o'clock because we hope to reach an agreement and it is possible to leave.

Q. You hoped to reach an agreement concerning this difficult labor situation; right?

A. Yes.

Q. To reach an agreement with whom?

A. Mr. Wolfson was speaking, I don't know to whom. He told me to wait, I will let you know some orders.

Q. Did you know Mr. Wolfson was speaking with Mr. Shannon Wall, the Executive Director of the International Maritime Workers Union?

A. I didn't know that.

Q. But you know that he was speaking with some representatives of the Union?

A. Yes.

Q. And was it at that time in the course of the day that Mr. Wolfson did tell you that negotiations were going on?

A. Yes, sir.

Q. And did he tell you there was a possibility of reaching an agreement with the Union?

A. Yes.

Q. And this was what you reported to the passengers; right?

A. Yes.

Q. To come back at 10:00 o'clock because by that time maybe an agreement would have been reached with the Union; is that right?

A. Yes.

[fol. 250] Q. Then at midnight you told the people that the cruise had been cancelled but they could stay aboard the ship?

A. Yes.

Q. Over night, is that right?

A. Yes.

Q. Captain, I think you said in the direct examination that the ship was ready to sail at 6:00 o'clock except for the unwillingness of the crew?

A. Yes.

Q. Had all the provisions been loaded by that time?

A. Yes.

Q. And they were loaded by whom?

A. Only by the Chief Steward and his assistant and a few men from the kitchen.

Q. And they loaded 70 tons?

A. No. The 70 tons was cargo for Nassau. This was supplies.

Q. The supplies were loaded but the cargo wasn't?

A. The cargo not.

Q. The cargo was not loaded. Who cancelled the cruise, Captain? From whom did you learn that the cruise was cancelled?

A. Mr. Wolfson talked to me.

Q. Mr. Wolfson told you?

A. Yes, he called me and he said the cruise is cancelled.

Q. Captain, did you discharge any of the members of the crew?

A. What?

Q. Have you discharged any of the members of the crew? Have you fired any of them?

A. From the 13th, no, no.

Q. You have not fired anyone?

Mr. Stratton: I didn't hear that.

Mr. Ostrin: From the 13th on.

Q. You still regard them to be employees of Ingres Steamship Company?

A. Of course.

Q. On your ship, is that right?

A. Yes.

[fol. 251] Mr. Ostrin: I have nothing further, your Honor.

The Court: We will take a short recess.

(Short recess.)

(After recess.)

JOHN W. ATWELL, residing at 7001 Colonial Road, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAllister:

Q. Mr. Atwell, what is your occupation?

A. I am the operating manager for the Cosmopolitan Shipping Company, Incorporated, at Pier 42.

Q. What is the Cosmopolitan Shipping Company?

A. We are managing agents for various steamship lines and companies.

Q. Are you managing agent for the Ineres Steamship Company?

A. We are acting as ship's husbands for the Ineres Nassau Agency, New York.

Q. And what does a ship's husband do?

A. Well, we supervise the vessel while it is in the Port of New York in regards to loading of cargo, working the ship and arranging for dispatch.

Q. Taking care of the docking facilities?

A. We enter and clear the vessel also, yes.

Q. Do you do this for other steamship lines as well as the Ineres Line?

A. Yes.

[fol. 252] Mr. McAllister: Your Honor, I am going to ask counsel in order to expedite the matter whether he will concede that the entry of these vessels, both the *Nassau* and the *Victoria*, were lawful, that there was lawful entry in the Port of New York; that all of the laws with regard to entry had been complied with and all necessary regulations?

Mr. Ostrin: I don't know about departing, but certainly they lawfully entered the Port of New York.

Mr. McAllister: Only in so far as compliance with the necessary maritime regulations.

Mr. Ostrin: I will admit it.

Q. Mr. Atwell, did you make arrangements for the docking of the *Nassau* in Pier 42?

A. Yes, I did, my department did, my Port Captain.

Q. Had you made arrangements at the dock for the Motorship *Victoria* on May 15th when it arrived?

A. Yes, she was also scheduled to dock at Pier 42, North River.

Q. Did you dock the *Victoria* at Pier 42?

A. No, we could not dock the ship at Pier 42 because we did not have a berth. By that I mean the Norwegian American Line needed a berth on Monday morning and they advised us that we could not bring the *Victoria* in as long as the *Nassau* was remaining on the north side of Pier 42.

Q. Did you attempt to find another berth for the M S *Victoria*?

A. Yes, we endeavored to secure a berth on Saturday morning, the 14th. We called various friends that we deal with in New York.

[fol. 253] Q. Were you able to obtain a berth?

A. No, we could not secure a berth.

Mr. McAllister: Your witness.

Cross examination.

By Mr. Ostrin:

Q. Mr. Atwell, you said you are operating manager of the Cosmopolitan Shipping Company. You have been acting as agent for Ineres, is that right?

A. Well, I was employed back in 1950, 1952, and I think it was during that two year period that we acquired the husbandry agency for the Ineres Line; Incorporated.

Q. And in the course of your relationship with Ineres Lines have you had conversations with any of its personnel?

A. Oh, yes.

Q. With whom?

A. Well, I could say I have probably spoken with everyone in their office, Mr. Wolfson, and I think I have had occasion to talk with Mr. Berlingeri, Mr. Jordan.

Q. You have talked to both Mr. Wolfson and Mr. Berlingeri, is that right?

A. Yes.

Q. In connection with what sort of matters?

A. Just to advise him that the vessel was coming into port or that we had certain cargo. By that I mean I received the first report on the ship when she comes into Ambrose and it was always standing instructions as soon as we had a report that the ship arrived in port or came into Ambrose to notify the Ineres Line.

Q. Mr. Atwell, is it correct to say that when you spoke to Mr. Wolfson or Mr. Berlingeri depended upon who is more readily available to you?

A. Yes, I believe so. I also passed that information on to a Mr. Jordan.

[fol. 254] Q. But so far as you were concerned in your dealings with the company it made little difference whether you spoke to either Mr. Wolfson or to Mr. Berlingeri, is that right?

A. No, as long as I gave someone the information.

Q. And the information had to do with the operation of the vessel?

A. Yes.

Q. By whom is the Cosmopolitan Shipping Company paid, do you know?

A. That I don't know.

Q. You don't know?

A. No.

Q. You don't handle the finances?

A. No, I am only a department head.

Q. Mr. Atwell, do the Nassau and the Victoria regularly dock at Pier 42?

A. Yes.

Q. Do you know who controls or holds that pier?

A. It is a City-owned pier and it is under lease to the Norwegian-American Line.

Q. So I take it it is used by both Ineres and Norwegian-American Lines?

A. Yes, sir.

Q. Is there any other company that uses that pier?

A. Not to my knowledge.

Q. In the course of your contacts with the Ineres Steamship Company do you ever receive orders from one of its representatives or directions or requests to do something?

A. No. The only time ever was Mr. Wolfson had requested us to secure a berth for the Victoria.

Q. He requested you to secure a berth for the Victoria?

A. For the Victoria when it was found the ship would not dock at Pier 42.

Q. In the normal conduct of your business with the Ineres Steamship Company are there occasions when you receive requests to do something in connection with either the Nassau or the Victoria?

A. Only in connection with the operation of the ship in port, in New York.

[fol. 255] Q. And from whom would you receive those requests?

A. Well, we could get them from Mr. Jordan, Mr. Wolfson, Mr. Berlingeri.

Q. From any one of the three?

A. From any one, yes.

Q. Any one of the three might ask you, as the manager of Cosmopolitan Steamship Company to do something in connection with the operation of the vessel?

A. Yes.

Q. What do you mean by the operation of the vessel? What goes into that so far as your company is concerned?

A. Well, just as far as my department is concerned, we supervise the disembarkment of passengers. By that I mean we order lab or to handle baggage, to take it off the ship. We also hire store gangs. We also hire linemen, bunkers for the ship, tugboats, pilots.

Q. All of these things are necessary for the proper berthing of a vessel, aren't they?

A. Correct.

Q. And all are in conjunction or in connection with the operation of the vessel?

A. Yes, sir.

Q. And, as I understand your testimony, you will receive or have received from time to time requests to perform certain operations or do certain things in connection with the operation of either the Victoria or the Nassau by any one of three people, either Mr. Wolfson, Mr. Jordan or Mr. Berlingeri, is that right?

A. Yes. They are the people that we deal mostly with.
Q. And these are the ones that you have contacted?
A. Yes.
Q. Do you know who Mr. Jordan is?
A. I believe Mr. Jordan has a title. I know who he is. [fol. 256] I believe his title is passenger manager or passenger traffic manager of the Incres Line Agency.

Mr. Ostrin: That is all.

(Witness excused.)

Luigi Rossaldi, residing on the Steamship *Nassau* at Pier 42, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAllister:

Q. What is your nationality?
A. Italian.
Q. What is your occupation on board the S/S. *Nassau?*
A. Maitre d'hote.
Q. What are your duties on board the S/S. *Nassau* as
A. Maitre d'hote.
A. Supervising the dining room, embarking of passengers, disembarking of passengers and general care of passengers.
Q. Were you on board the *Nassau* when it docked at Pier 42 Friday morning?
A. Yes, sir.
Q. What were you doing at that time?
A. At that time I was taking care of the disembarking of the passengers.
Q. Where were you about 9:30 that morning?
A. I was in the dining room.
Q. What were you doing there?
A. Supervising the breakfast. It was closing time for breakfast.
Q. What was the location of the dining room with reference to the dock itself?

A. It is about the same floor, the height of the dock.
[fol. 257] Q. And are there portholes?
A. Yes.
Q. From the dining room to the outside of the ship?
A. Yes, from the dining room to the outside of the ship.
Q. Will you just tell us what you heard and what you saw at that time?
A. I hear through the porthole, you know, somebody shouting that we are on strike on shore. So I have to take a look out of the porthole and I see part of the crew. He shouts everybody—
Q. Will you talk more slowly?
A. "Come everybody ashore because we are on strike." But this has happened many times when they were speaking about strikes on the ship. So I thought it is going on again. So I go upstairs.
Q. Before we go to that, Mr. Rossaldi, did you see any crew members on the dock?
A. Yes, there was mixed. There was a few people I didn't know.
Q. Did you see others on the dock who were not crew members?
A. Not crew members, yes.
Q. Could you see from the porthole where you were looking any picket line?
A. No, sir.

Mr. Ostrin: What day are we talking about now?
Mr. McAllister: This is Friday.
Mr. Ostrin: The 13th?
Mr. McAllister: May 13th.

Q. Tell us what took place about 6:00 o'clock Friday evening, that same day?
A. The same day I see all the waiters start to disembark the passengers so I seen them working all around, so I see no strike because nothing happens. I did go to look and make observations about table reservations for the passengers in the lounge upstairs.
[fol. 258] Q. Will you please speak a little bit more slowly?

A. So at 5:00 o'clock usually I help the assistant, I help assist the head waiters and take care of table reservations for the passengers. They are standing in line and they are sitting, and we are starting with the reservations to please the passengers.

Q. What time was this, about?

A. It was about 5:00, quarter past 5:00.

Q. Quarter past 5:00?

A. Yes.

Q. And then what happened?

A. About 6:00 o'clock we didn't see any stewards any more around bringing the passengers in. So I was wondering, but I didn't inquire about it. Finally there comes in a little man, an Italian, he said, "Hey, Rossaldi, a strike ashore."

"Who are you?"

Q. Did someone come to you?

A. Yes. Two men. I didn't know which. One colored man and one white man. The little one, is asking me, "Who are you?" He ordered me to go out. "We are representing the Union." He said, "You have to go ashore."

Q. Speak slowly.

A. "We are representing the Union, the American International Union, and everybody is on shore of the crew, so you are ordered to go ashore."

I say to him just at the moment: "I take orders only from my Chief Purser."

Q. Is the Chief Purser, your boss?

A. Yes, directly my boss. So I did go down to him and I asked him, "What's it all about?" Because I didn't know what was happening and he has told me everybody is on shore.

"You can go ahead and take some passengers but there is nobody to take care about it, so what do you want?"

[fol. 259] Q. What did you do?

A. So I called the assistant head waiter, and called him down and I say: "We can do nothing alone here. Let us go take a look what's happening. Let's go ashore also."

So we go ashore. All the crew was there. There were many men. They were speaking there and I see pickets

go up and down. Then they called something with the *Nassau* unfair. I didn't read all the stuff.

Q. Did you see that after you went ashore?

A. Yes.

Q. Can you recognize in the court room either of the two men who came on board the ship?

A. No.

Q. They are not here?

A. No.

Q. Why did you go ashore?

A. Just more out of curiosity than anything, to see what was happening, what the boys are doing. They were all on strike.

Mr. McAllister: No further questions.

Cros examination.

By Mr. Ostrin:

Q. Mr. Rossaldi, you said that you were in the dining-room at about 9:30 in the morning of May 13th? You have to say either yes or no, because the reporter can't take it when you shake your head. The reporter can't see what you are doing. You must say yes or no.

A. Yes.

Q. And at 9:30 in the morning the vessel had not as yet docked, had it?

A. Yes, it was docked.

Q. It was docked?

A. Yes.

Q. And you say there were portholes in the dining-room out of which you could look onto the dock?

A. Yes, sir.

[fol. 260] Q. At that point, you say this was about 9:30, you heard some of the people talking about strike. Who did you hear talking about that? Was it members of the crew?

A. Members of the crew mixed with people that I didn't know.

Q. Members of the crew with whom?

A. Also people that I didn't know who it was.

Q. Were they passengers?

A. No, I don't think so. I don't know.

Q. Was anybody aboard the ship at 9:30 in the morning?

A. What?

Q. Had anybody gotten aboard the ship from shore at 9:30 in the morning?

A. Well, I think yes, because many of us had passengers to bring the baggage there.

Q. What time did the vessel dock, actually?

A. 9:00 o'clock, about.

Q. And then the gangway would let down and people could have gone aboard the ship?

A. I don't know.

Q. You don't know?

A. No.

Q. But you do know you saw people in the dining-room?

A. Out of the dining-room.

Q. Members of the crew?

A. On the pier.

Q. Let us start all over again. I don't think I understand you. You were in the dining-room at about 9:30 in the morning?

A. Yes, sir.

Q. You were looking out of the porthole?

A. No, I didn't look at 9:30.

Q. You heard some of the crew members in the dining-room say something about a strike?

A. Yes.

Q. And you saw some strangers there?

A. No, sir; outside on the pier it was.

Q. There were no strangers in the dining-room, were there?

A. No.

[fol. 261] Q. But you heard the crew members talking about a strike?

A. Yes.

Q. And I think in substance you said that that didn't excite you too much, because you heard about a strike before?

A. Yes, sir.

Q. When was the other time that you heard about a strike?

A. Oh, many times. Sometimes they are speaking, sometimes making fun; so I didn't think of it.

Q. Did you hear about a strike while the ship was coming in from Nassau?

A. No, always in port here.

Q. Always in port?

A. Yes.

Q. Did you hear about a strike in connection with the crew members wanting more wages?

A. Yes, something about that they were speaking.

Q. And about their wanting better conditions?

A. Yes.

Q. And in connection with this hearing about a strike, and I am talking about hearing of a strike before May 13th, did you hear talk about this new International Maritime Workers Union?

A. Yes, sir. I hear something about it.

Q. And did you hear the people in the Steward's Department talk about their wanting to be represented by the International Maritime Workers Union?

A. Not represented, but to be a subscriber.

Q. To be part of the contract?

A. Yes.

Q. You heard them say this, that they want the International Maritime Workers Union to have a contract with the company for their benefit?

A. No.

Q. Well, what did you hear?

A. That they have to be inscribed, everybody, as a crew member in the new International Seaman's Union.

[fol. 262] Q. That they should join the new union?

A. Yes, join.

Q. And you heard all of this even before May 13th, didn't you?

A. Yes, months before.

Q. And you heard talk about a strike in this connection, is that right?

A. Yes, sir.

Q. I want you to understand my questions, because I want you to pay attention to them. If you don't know them, ask me. What you have said so far is true and you understood everything I asked you, is that right?

A. Yes, sir.

Q. Then when was it that you saw the pickets?

A. It was evening, after six o'clock.

Q. And where were you when you saw the pickets?

A. Down by the pier. In front of the pier, on shore.

Q. And were these signs that you saw them wearing, referring to Defendants' Exhibits D and D-1?

A. Yes, instead of Victoria it was Nassau.

Q. But otherwise it was the same sign; right?

A. Yes, sir.

Q. How many pickets did you see wearing these signs?

A. Three or four men.

Q. No more than four?

A. No.

Q. And were they marching up and down peacefully?

A. Yes. Peacefully, in front of the pier.

Q. How far were you from them?

A. Oh, I must have been about fifty, sixty feet.

Q. You were fairly close to them; right?

A. Yes.

Q. Were they making any disturbance?

A. No.

Q. Were they talking?

A. They were talking between them, you know.

Q. Between themselves?

A. Yes.

Q. They weren't shouting, were they?

A. No.

Q. They weren't making any disturbances, were they?

A. No. I didn't notice it at all.

[fol. 263] Q. Would you say that the picketing, so far as you were able to see, was in all respects peaceful?

A. I think so.

Q. And orderly?

A. Yes, sir.

Q. Do you know whether the pickets accused anybody or threatened anybody?

A. I don't know.

Q. Did you see anything like that?

A. No, sir.

Q. Now you say about six o'clock that evening two men came aboard the ship. You don't know who they are?

A. No.

Q. And they said they will go on strike. What was it they said?

A. One must have been an Italian, an American-Italian, because he was speaking a mixed language, you know.

Q. He was speaking broken Italian?

A. Broken Italian. "Paisanos, strike." That means, "Landsmen, come out on strike."

Q. Where did they talk to the people. Was this in the dining-room?

A. No, in the lounge upstairs.

Q. How many people were there?

A. There were about a hundred passengers in lines, double lines, because there are two settings. And there was a head waiter, my assistant, and I alone.

Q. Were the crew members there?

A. No.

Q. They came in this room where there were no crew members and they said in broken English: "Hey, let's go off"?

A. One was speaking, the little one. The colored one, he stayed by the door.

Q. And he said, "Let's strike"?

A. Yes.

Q. And you heard this very clearly?

A. Yes.

Q. And these were not members of the crew, were they?

A. No. I never seen them before and never after that.

Q. And you don't know who they are or where they came from?

A. No. I asked them who they are, and they told me: "We are representatives of the International Union."

[fol. 264] Q. Oh, I see. They told you that?

A. Yes, because I wouldn't want to take orders from nobody, you know, that you don't know who they are.

Mr. Ostrin: I have no further questions.

(Witness excused.)

* * * * * * *

[fol. 266] PAOLO VAGLIASINDI was recalled as a witness in behalf of the plaintiff, and having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. McAllister:

Q. Captain, I hand you Plaintiff's Exhibit 4 for identification and ask you to please state what that is.

A. It is the Ineres Line contract for the crew, for the crew that is on board the steamships *Nassau* and *Victoria*.

Q. Is this the document referred to in the seamen's articles?

A. It is.

Mr. McAllister: You may examine.

Cross examination.

By Mr. Ostrin:

Q. Captain, the document that you have in your hand, Plaintiff's Exhibit 4 for identification, is referred to in Defendants' Exhibit C in evidence, is that right? It is made mention of? This document is made mention of in this document, is that right (indicating)?

A. It is, yes.

Q. Where in this document do we have mention made of it (referring to Defendants' Exhibit C)?

(Witness indicates.)

[fol. 267] Q. The very last paragraph which in English says, "Having read the contents of the contract of the Ineres Steamship Company, Ltd. which to all effects and purposes is to be considered hereafter fully transcribed, and having read the present agreement, the parties have

accepted and signed same before me, Counsel General of the Republic of Liberia," is that right?

A. Yes.

Q. That is the paragraph you are referring to?

A. Yes.

Q. In other words, Captain, as I understand it, when a seaman signs the crew roll and articles of agreement, which is in evidence as Defendants' Exhibit C, he agrees to be bound by this document which is Plaintiff's Exhibit 4 for identification?

A. Yes.

Q. Does the seaman who signs Defendants' Exhibit C, does he negotiate with the company for this?

COLLOQUY

Mr. McAllister: I object, your Honor. We are just trying to identify the document. It is irrelevant.

Mr. Ostrin: I am leading up to something, your Honor. I want to know whether Plaintiff's Exhibit 4 for identification is a unilateral set of rules which are imposed upon a seaman who takes employment, or whether there is collective or individual negotiation.

Mr. McAllister: Your Honor, there has been no showing that the Captain takes any part in the matter.

Mr. Ostrin: We want to get to the truth of this, your Honor. We want to get to the bottom of it.

[fol. 268] The Court: It doesn't make any difference in this case whether it is unilateral or not. The only point involved is whether you have got a right to interfere with the two ships. That is my ruling in this case. I don't think that makes any difference.

That is all. You may step down.

Mark it in evidence subject to translation. This is not a trial, this is a hearing on a temporary injunction.

(Plaintiff's Exhibit 4 for identification received in evidence.)

Mr. McAllister: Your Honor, we would like to call the official interpreter to translate for the record, if we may, the three articles, which are quite short.

The Court: You may.

Mr. McAllister: I refer to Plaintiff's Exhibit 4 in evidence and I ask the official translator to please translate Article 5, which consists of four lines.

The Official Translator: "Article 5. Conduct of enlisted men.

"The crew has the duty of maintaining discipline, to obey all legitimate commands by the Master, or by any other superior, or any regulations which involve the service and the safety of the ship, of its cargo and of its provisions."

Mr. McAllister: I ask you, please, to turn to Article 8 of Plaintiff's Exhibit 4 and please translate that.

The Official Interpreter: "Article 8. Beginning of service on board.

[fol. 269] "The enlisted must be on ship on the day and time indicated by the ship owner or by any of his representatives or by the Master. In lack of this indication, he must be on board at least two hours before sailing. In case the seaman does not comply with these dispositions, under the contract of enlistment, he will be dealt with as terminated, being terminated by default of the seaman himself, unless the enlisted person can furnish proof that the lateness was due to an act of God or was due to a justified motive."

Mr. McAllister: I ask you, please, to turn to Article 34 of Plaintiff's Exhibit 4, and to please read the heading and substance.

The Official Interpreter: The title of Article 34 is: "Termination of the contract of enlistment."

Mr. McAllister: Will you then continue?

The Official Interpreter: "The contract of enlistment can be terminated:

"(a) By will of the seaman,

"(b) By will of the ship owner—see Article 35.

"(c) By Act of God or by just cause.

"(d) By enlistment of the seaman in the Army as an officer or commissioned officer or soldier.

"(e) By fault of the seaman."

Mr. McAllister: Will you please continue, Subparagraph A:

[fol. 270] The Official Interpreter: Subparagraph A refers to "(a) Termination by whim of the seaman."

Mr. McAllister: Will you please read on:

The Official Interpreter: "The contract of enlistment can be terminated by the enlisted man with notice of at least 48 hours before the departure of the ship from the port of the ship owner or of 48 hours before the arrival in the port."

Mr. McAllister: Does that conclude paragraph A?

The Official Interpreter: No, there is some more.

"The seaman will be given the indemnity for the termination of the contract corresponding to his seniority but without any minimum guarantee."

Mr. Ostrin: Does this follow A?

The Official Interpreter: This follows A. It is a continuation. I am turning the page:

"The enlisted man cannot be disembarked without the authorization of the Maritime Authority or of the Consul in case he cannot be replaced. In any case the termination of the contract by the free will of the seaman frees the ship owned from the obligation to take the enlisted man to the port where he was enlisted and all expenses of the repatriation will be paid to the seaman himself."

Mr. McAllister: Does that conclude your translation of Article 34, Subparagraph (a)?

The Official Interpreter: That is right.

[fol. 271] Mr. McAllister: Thank you.

The Court: Plaintiff rests?

Mr. McAllister: Plaintiff rests, your Honor. We have only two further documents that were requested of us by the defendant. The first is a list of the men who left the *Victoria* Wednesday morning at 6:00 or 6:30 A. M., and we understood they undertook to procure the gangway list. This identifies those individuals and I hand to Mr. Ostrin a list of those men (handing paper to Mr. Ostrin).

Mr. Ostrin: That left the vessel?

Mr. McAllister: That left the vessel.

Mr. Ostrin: I remember that.

Mr. McAllister: Your Honor, we were also asked to produce a list of some 200 names of persons of the crew

of the *Victoria* in the stewards department who signed the paper at, I believe, 2:00 A. M. on Wednesday.

This document I have in my hand contains an opening statement which is in Italian and under which the signatures appear. I would ask leave to have Mr. Ostrin come to a conference at the bench before these names are turned over, if I may.

(Discussion at the bench, off the record.)

The Court: Plaintiff rests. We will take a short recess.

(Short recess.)

* * * * * * *

[fol. 282] Afternoon Session
2:00 O'clock P. M.
Monday, May 23, 1960

Mr. Ostrin: Your Honor, in view of the amount of testimony that has been adduced by the plaintiff and the testimony which will be adduced by the defendant, I was wondering whether perhaps we could stipulate with counsel for the plaintiff that the hearing on the motion for a preliminary injunction might also be regarded and treated as a hearing on the trial for a permanent injunction. We are ready to go ahead with our evidence. We would be prepared within a few days to get in our answer and perhaps counsel can file his note of issue and we can regard this hearing on the preliminary injunction also to be the hearing for the permanent injunction.

The Court: That would be a desirable thing, I should imagine.

Mr. Ostrin: I imagine that would be a very desirable procedure.

Mr. McAllister: My only problem is, your Honor, we have not set forward yet any proof of damage and that we would wish to do at a later trial.

The Court: Don't do that until you get your injunction.

Mr. McAllister: I understand.

Mr. Ostrin: I say if there was an injunction issue, we could still have a hearing on damages.

The Court: Yes, surely.

[fol. 283] Mr. McAllister: My only concern, your Honor, is, that it seems to me an effort of further delay.

The Court: I don't think Mr. Ostrin means to further delay.

Mr. Ostrin: No, I think this would expedite it. I am ready to go ahead with our testimony.

Mr. McAllister: But Mr. Ostrin said he would not have an answer in for a few days, as I understood him.

The Court: That wouldn't make any difference. In other words, you would want me to withhold my disposition on the preliminary injunction until after your answer is in?

Mr. Ostrin: I don't think that is necessary, your Honor. Our answer essentially is going to be a general denial, with some affirmative defenses, and I think your Honor knows them and Mr. McAllister knows them, jurisdiction labor dispute, and so on. I might say just what our affirmative defenses will be. One will be that the Court has no jurisdiction of the subject matter of the action. Another is that there is a labor dispute within the meaning of 876-A, and that the plaintiffs have not complied with it, and, third, will be that this is not coercive picketing, the first amendment, it is legitimate trade union activity, and that will be about the extent of our affirmative defenses.

Mr. McAllister: Your Honor, I hesitate to stipulate now until I have heard the evidence. We may wish to make [fol. 284] replies to whatever evidence may be adduced here, but, beyond that, and the point of damage—

The Court: I think Mr. Ostrin's only purpose is he wants to get a stipulation from you that such testimony as is taken here on the application for a preliminary injunction may be deemed by both parties as evidence taken for the permanent injunction, so that the Court can give a definitive disposition, and he can go up to 25th Street.

Mr. McAllister: We will so stipulate, your Honor.

Mr. Ostrin: As a matter of fact, I think this would expedite it.

The Court: Yes, I think so.

Call your first witness.

SHANNON J. WALL, residing at 64 West Saddle River Road, Waldwick, N. J., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Ostrin:

Q. Mr. Wall, do you hold an office in the International Maritime Workers Union?

A. Yes, I do. I am the Executive Director of the International Maritime Workers Union.

Q. Do you know when the International Maritime Workers Union was formed?

A. Late November 1959.

Q. Does the International Maritime Workers Union have a Constitution?

A. Yes, it does.

[fol. 285] Mr. Ostrin: May I have this marked?

(Constitution of the International Maritime Workers Union marked Defendants' Exhibit E for Identification.)

Q. I show you Defendants' Exhibit E for Identification and ask you whether that is the Constitution of the International Maritime Workers Union?

A. Yes, it is.

Q. Do you recall the date that it was adopted?

A. November 25, 1959.

Mr. Ostrin: I offer the Constitution in evidence.

Mr. McAllister: No objection.

(Defendants' Exhibit E for Identification received in evidence and marked Defendants' Exhibit E.)

Q. Mr. Wall, who formed the International Maritime Workers Union?

A. It was formed by the National Maritime Union and the Seafarers International Union.

Q. Are both of these organizations American Labor organizations?

A. Yes, they are. They are both affiliated with the Ameri-

can Federation of Labor, Congress of Industrial Organization.

Q. And both represent merchant seamen?

A. Yes, they do.

Q. Are you a member of the National Maritime Workers Union?

A. Yes, I am.

Q. Do you hold an office in the National Maritime Workers Union?

A. Yes, I do.

Q. Do you know whether the National Maritime Workers Union admit to membership and represent non-resident [fol. 286] alien seamen?

A. We have non-resident alien seamen membership, yes.

Q. Does the National Maritime Union also represent alien seamen?

A. Yes.

Q. Are these seamen employed aboard vessels with whom the National Maritime Union has contracts?

A. Yes, they are.

Q. Are these seamen covered by the same contracts which cover American seamen?

A. In the main, yes.

Q. Mr. Wall, have you ever heard of the International Federation Transport Workers Union?

A. Yes, I have.

Q. Will you tell us something about that organization?

A. The International Transport Workers organization has headquarters in London. The Executive Secretary is Mr. Omar Becu.

Q. (Spelling) B-e-c-u?

A. B-e-c-u. It is made up of some 62 nations, those that are not behind the Iron Curtain, the free countries of the world, and made up of the various Transport Workers Trade Union centers in the various countries.

Q. And these Transport Workers Unions, I take it, include Maritime Unions?

A. Yes. There is a special section of seafarers and dockers.

Q. And I take it there are other Transport Workers Unions who are not identified with the marjtime industry?

A. That is right.

Q. They would include what type of Unions?

A. Railroads in the main, Trucking industries, Airlines.

Q. This is an International Confederation of Transport Unions throughout the entire free world, is that right?

A. That is correct.

Q. Is the National Maritime Union a member of the I. T. F.?

A. Yes, it is.

[fol. 287] Q. I. T. F. stands for International Transport Federation Union, does it not?

A. Federation.

Q. Is the Seafarers International Union of North America a member of the I. T. F.?

A. Yes, it is.

Q. As an officer or member of the National Maritime Union, did you have occasion to attend a conference of the I. T. F. in London prior to the formation of the International Maritime Workers Union?

A. There have been several meetings.

Q. When was the meeting preceding the date that the International Maritime Workers Union was formed, the approximate date of that?

A. The date of the meeting preceding—

Q. That is right, bearing in mind that the I. M. W. U. was formed on November 25, 1959?

A. There was a meeting immediately subsequent to that the 1st of December.

Q. Was there one before that?

A. There were a number of meetings, two in London in January and March, one in Athens, one in Geneva, Switzerland.

Q. Did you attend those meetings?

A. I did not. I attended the two in London.

Q. You attended the two in London?

A. Yes.

Q. And those preceded the date of the formation of the International Maritime Workers Union?

A. Yes.

Q. In the course of these meetings was one of the items

under consideration and discussion the question of Panlibhon or runaway vessels?

A. That was practically the entire purpose of the two meetings.

Q. Can you tell us how the name "Panlibhon" is derived? How was it obtained?

A. It is derived from the first letters of the countries of Panama, Liberia, Honduras.

[fol. 288] Q. Is there anything unusual about these countries so far as the maritime industry is concerned?

A. These are the countries commonly known as the flags of convenience.

Q. What does that mean, Mr. Wall?

Mr. McAllister: Your Honor, I object to this.

The Court: I will allow that. I think we might get a little instruction about the maritime industry.

Mr. Ostrin: I think it is background, your Honor.

A. These countries register vessels for a fee and for other commitments, whose vessels are not necessarily owned by the Nationals of that particular country.

Q. In other words, Nationals of other countries register their vessels in either of these three countries, Panama, Honduras, Liberia, is that correct?

A. That is correct.

Q. Was there any action taken at the meetings of the I. T. F. where you were present concerning jurisdiction of Maritime Unions over these so-called Panlibhon vessels?

A. Yes. In the two meetings in London, in the early part of 1959, a policy was adopted, awarding jurisdiction to the Trade Union center in the country where the ownership and/or effective control of the vessel was vested.

Q. Were the American Unions awarded jurisdiction over Panlibhon vessels which regularly operate between American ports and foreign ports?

A. Yes, they were.

Q. Was it after this award of jurisdiction to the American Unions that the International Maritime Workers Union was formed?

A. Yes.

[fol. 289] Q. Mr. Wall, how long have you been a member of the International Maritime Workers Union?

A. Some 15 years.

Q. And how long have you held office in the National Maritime Workers Union?

A. Very close to ten.

Q. And your present office is vice-president?

A. That is correct.

Q. In your capacity as an officer of the National Maritime Workers Union, have you engaged in collective bargaining negotiations with ship owners having contracts with the N. M. U.?

A. Yes, I have.

Q. Can you tell us, Mr. Wall, what, if any, effect these Panlibhon vessels have had and do have upon American flag vessels having contracts with American seafaring unions?

A. These vessels are in the main in direct competition with the vessels that we have under contract and constantly in negotiations the ship owners' spokesmen, refer to the conditions in the industry, refer to the competition of the foreign shipping interests, and refer specifically to the runaway flags, the competition.

Q. What effect have these Panlibhon vessels which are in competition with American flag vessels under contract to the N. M. U. have upon the wages, hours, and working conditions of American seamen?

A. They tend to put a limit upon the heights at which we can negotiate, the amount of money.

Q. What effect has it had upon the jobs of American seamen?

A. We have lost many jobs.

Q. How?

A. Through the transferring of American vessels to these foreign flags, vessels that were formerly under contract to the National Maritime Union and the Seafarers.

[fol. 290] Q. Are the purposes for the formation of the Maritime—

Mr. McAllister: Your Honor, I do object to an inquiry which has no relevance here. There is no indication what-

soever in the record that these vessels in question have ever been under the American flag.

The Court: I was about to ask that question.

Mr. Ostrin: The witness testified—

The Court: Were the Nassau and Victoria ever under the American flag?

The Witness: Not to my knowledge.

Mr. McAllister: Your Honor, the record shows they were not. They were under the British flag and never under the American flag.

The Court: Yes.

Mr. Ostrin: I was about to say, your Honor, that the witness has testified that a Panlibhon vessel is one whose flag of registry has no connection, no substantial connection with the country of ownership.

Mr. McAllister: Let the witness testify, rather than Mr. Ostrin.

Mr. Ostrin: No, he testified to that.

Q. Mr. Wall, are the purposes for the organization of the International Maritime Workers Union set forth in the preamble of the I. M. W. U. constitution?

A. Yes, they are.

Mr. Ostrin: With the Court's permission, may I read into the record the preamble?

The Court: You are only wasting time. This is marked [fol. 291] as an exhibit. I am reading it now, so I don't think you have to read that.

Mr. Ostrin: All right.

The Court: In fact, I have read it twice.

Q. You know that the plaintiff vessels operate regularly between New York and the Caribbean islands, right?

A. Yes.

Q. Are there any shipping companies under contract to the N. M. U. which are engaged in the same trade and traffic?

A. I can recall two, the Grace Line and Moore, McCormack.

Q. Does the Grace Line operate a regular passenger cruise business between New York City and other American ports, and the Caribbean?

A. Yes, it does.

Q. Do you know the names of the vessels that are engaged in that traffic?

A. The *Santa Paula* and *Santa Rosa*.

Q. Do you know whether the wage rates of the members of the crews of the *Nassau* and *Victoria* are on a par with the wage rates of the seamen who work on the *Santa Paula* or the *Santa Rosa?*

A. I know that they are not on a par.

Q. Is there a differential?

A. Yes.

Q. Is it a substantial one?

A. Yes. I would say that an A. B. on an American ship gets approximately $360 a month as against $100 a month or less on a Panlibhon vessel.

Q. The Panlibhon vessel you are referring to now is the Incres Line vessels, is that right?

A. Right.

Q. What about the other conditions of employment? What about overtime?

A. Overtime rates are entirely different—

[fol. 292] Mr. McAllister: Your Honor, I object to a comparison of the American scale with the scale of a foreign—

The Court: I don't think that is part of this case, Mr. Ostrin.

Mr. McAllister: I don't think it is at all, your Honor.

Mr. Ostrin: May I be heard on that?

The Court: We are not discussing the question of whether the aims, purposes, and ambitions of the I. M. W. U. are laudable or not. That is not the question before the Court. The question here is whether or not these people have a right to picket and strike and hold up these vessels.

Mr. Ostrin: May I be heard on that, your Honor?

The Court: Yes.

Mr. Ostrin: I submit that this line of inquiry is relevant to show that there is, in fact, a labor dispute between the International Maritime Workers Union and the Incres Steamship Company, which involves not only the wages, hours, and working conditions of the unlicensed personnel

aboard the *Nassau* and the *Victoria*, but also has a direct effect upon the wages, hours, and working conditions of American seamen who are employed aboard vessels, American flag vessels, in direct competition with the Incres Lines, and that this dispute is very much a dispute between an American union on behalf of American seamen, with a Panlibhon vessel, namely, a vessel flying the flag of a country that has no substantial connection with the country of ownership.

[fol. 293] I submit that this is relevant, your Honor, because if allowed to offer this kind of testimony in the record, this case will fall, and does fall, clearly within the holding of the Marine Cooks & Stewards case. In Marine Cooks & Stewards, the Court held, quite properly, we believe, that there was a labor dispute between American unions and a foreign company, which dispute affected the wages, hours, and working conditions of American seamen, and I propose through this line of inquiry to adduce evidence which will establish, I believe, that here, too, quite apart from the internal economy of the *Nassau* and the *Victoria*, that we have a very serious labor dispute between an American union and a foreign company affecting directly the wages, hours, working conditions and jobs of American merchant seamen.

The Court: The only answer to that that I can think of is that this is not an American union in the sense that we understand it, because by that very preamble it only refers to seamen who work on ships under registry where the ships are not owned substantially by the country of registry. So how do you refer to this as an American union?

Mr. Ostrin: Your Honor, I refer to this as an American union because it was formed and organized by two American unions. Its principal officers are American seamen. It has presently members who are American seamen, and it is formed for two purposes: one, to improve the wages, hours, [fol. 294] and working conditions of seamen employed aboard Panlibhon vessels, and, two, to protect the wages, hours, and working conditions of American seamen and to protect their jobs.

This union, and if evidence is necessary on this, we propose to establish that this union has filed its constitution

and other documents with the Department of Labor under the provisions of the Landin-Griffin Act, that it is required to report to the Department of Labor concerning its finances, its method of operations, and so on, regularly to the Department of Labor, and that this union is very definitely formed and established to protect the interests of American seamen.

The Court: It doesn't say that in the preamble. It says, "Therefore, this union has been formed to improve and protect the wages, hours, and working conditions of all seamen employed aboard vessels whose flags are foreign to the United States of America, and whose ultimate ownership and control has no substantial connection with the country of registry."

Mr. Ostrin: There is more to that preamble than that, your Honor.

The Court: I know there is another sentence, but that is the meat of it. This union is not interested in American seamen, because American seamen are not employed on this Panlibhon, whatever you call it—

Mr. Ostrin: I respectfully must differ with your Honor. Your Honor, as this witness has testified, American mari- [fol. 295] time unions have long been concerned with the operation of these Panlibhon vessels, because they have had a direct effect upon American wages, hours, and working conditions. This witness has testified that the American seamen have lost jobs by reason of transfer of vessels to Panlibhon registry. This union in the interest—and this has been made clear—it is the avowed purposes of this union, and it is a matter of public knowledge, it had been used in connection with the Afran case and others—the sole purpose of this union is to protect American wages, hours, and working conditions in the only way it can do it—

The Court: Show it to me in this document, to support what you are saying.

Mr. Ostrin: The preamble reads as follows:

"The history of maritime labor conclusively demonstrates that only through union organization can merchant seamen achieve the dignity and well-being that is the natural right of working men. Decent wages, fair treat-

ment, vastly improved working conditions, job security, pension, and welfare benefits, and the inspiration of united brotherhood are only some of the advantages organized seamen now enjoy as a direct achievement of strong and energetic maritime unions. To retain and enlarge these benefits"—I submit that this refers to benefits that have already been achieved and gained and won—"to retain and enlarge these benefits and to extend them" (the same benefits, if I [fol. 296] may interpolate, which were achieved by American seamen unions for American seamen) "to those unfortunate seamen who do not now partake of them, is the self-evident obligation of the established maritime unions. Direly in need of assistance are those seamen presently employed on runaway flag vessels, who are victimized by absentee ownership (that is this case here, absentee ownership) and other nefarious practices designed to depress labor standards (what kind of labor standards can we be talking about, your Honor, if not the labor standards of the members of the two unions that form this organization?)—designed to depress labor standards and thwart and limit national organizational aspirations."

Then the next paragraph:

"Like its shore side counterpart, the runaway ship is a device for eluding legitimate unionization and profiting from the weakness of the unorganized. Ship operators whose vessels fly self-styled flags of convenience have too long avoided the obligation of bargaining collectively with freely chosen representatives of their employees. As a consequence thousands of seamen are being denied human dignity, fair wages, decent working conditions, and other rights and benefits currently available to the legitimately organized portions of the industry."

The Court: Mr. Wall, a seamen who is employed, who is an American citizen on the S/S *American*, can he join this Union?

The Witness: Yes, he could.

The Court: Under your Constitution?

[fol. 297] The Witness: Yes.

Mr. Ostrin: Definitely.

The Court: Then you have to express it in more clearly defined language, because it certainly does not say so.

By Mr. Ostrin:

Q. Who were the forming members of this organization, Mr. Wall?

A. Officers and members of the National Maritime Union and Seafarers International Union.

Q. Are they all members of their respective Unions?

A. Yes.

Q. The NMU and the SIU?

A. Yes.

Q. Are they all citizens of the United States?

A. Yes.

The Court: Are they members of this Union?

The Witness: Yes.

The Court: They are members of this Union?

The Witness: Yes.

Mr. Ostrin: Yes.

The Court: Go ahead.

Mr. Ostrin: Then may I refer your Honor to Article 4 on Membership—

The Court: Mr. Ostrin, I should not ask questions because it takes up so much time. It is easier for me to allow you to go ahead with your examination than to ask questions. Go right ahead, sir.

Mr. Ostrin: May I also refer to Article 4 of the Constitution?

The Court: All right, go ahead.

Mr. Ostrin: Which deals with membership eligibility:

[fol. 298] "All seamen, regardless of race, color, creed or nationality, shall be eligible for membership upon such uniform and nondiscriminatory terms and conditions as may be determined, provided, however, that members, supporters, or sympathizers of Communists, Fascists, Nazi or any other subversive organization shall not be eligible to seek or hold membership in the Union."

I submit to your Honor—

The Court: You had better go ahead and ask questions. Don't submit, please, counselor.

Mr. Ostrin: All right.

By Mr. Ostrin:

Q. Is it your testimony, Mr. Wall, that the wages, hours and working conditions of seamen employed aboard the S/S *Nassau* and *Victoria* depress and have a tendency to depress the wages, hours and working conditions of American seamen?

A. Yes.

Mr. McAllister: Your Honor, I object to that question. I think this is wholly irrelevant. This kind of argument and discussion may properly be held before the Congress, which provides operating differentials to protect the wage scales of American seamen—

The Court: All right. Sustained. Exception.

Q. Mr. Wall, does the operation of—withdrawn.

Does the operation of the *Nassau* and *Victoria* by the Incres Steamship Company have a tendency adversely to affect the job opportunities that American seamen have [fol. 299] aboard American flag vessels which operate in direct competition with the Incres Lines?

A. Yes.

Mr. McAllistjer: The same objection, your Honor.

The Court: The same ruling. Strike out the answer.

Q. Mr. Wall, as Executive Director of the International Maritime Workers Union, did you for yourself and your organizers at some time embark upon an organizational campaign amongst the seamen employed on the S/S *Nassau* and *Victoria?*

Q. When did you start that organizing campaign?

A. Either in late January or early February.

Q. Of what year?

A. 1960.

Q. Will you tell us how you went about organizing the members of the crews of the *Nassau* and the *Victoria?*

A. Two of our organizers, Mr. Ted Chimiklas and Reni Lionanjie, boarded the vessel at various times when it was in the Port of New York, contacted crew members ashore

and set forth the aims and objectives of the International Maritime Workers Union and secured pledge cards. That was the beginning.

Q. How long has this organizational campaign been running?

A. Since early February.

Q. Were you actively engaged in this organizational campaign during the month of April 1960?

A. Yes.

Mr. Ostrin: May I have this batch of cards marked for identification, please?

[fol. 300] (Batch of cards marked Defendants' Exhibit F for Identification.)

Mr. Ostrin: May I also have this marked for identification?

(Batch of cards marked Defendants' Exhibit G for Identification.)

Q. Mr. Wall, I show you Defendants' Exhibit F for Identification and ask you whether you will kindly identify that?

A. Yes. These are pledge cards made out by the International Maritime Workers Union and distributed to crew members of the *Nassau* in this particular case.

Q. Are the cards which are packed together as Defendants' Exhibit F for Identification pledge cards signed by members of the crew of the *Nassau*?

A. Yes. I believe all of these are the *Nassau*.

Q. Will you look at Defendants' Exhibit G for Identification and tell us what they are?

A. They are marked as pledge cards from the *Victoria*.

Q. Were Defendants' Exhibits F and G for Identification, if you know, filed with the National Labor Relations Board at the request of the National Labor Relations Board?

A. Yes, they were.

Mr. McAllister: Your Honor I object to that.

The Court: Yes. Sustained. Exception.

Mr. Ostrin: I offer Defendants' Exhibits F and G for Identification in evidence.

Mr. McAllister: Your Honor, I object to the offer in evidence of these pledge cards. They have no relevance here whatsoever.

The Court: Sustained. Exception.

[fol. 301] Mr. Ostrin: May I make an offer of proof, your Honor, that on the back of pledge card is stamped "N.L.R.B., Section Region, New York, 1960, May 19, 1:47 P.M." Those are the pledge cards dealing with the *Nassau*. And that on the reverse side of each of these pledge cards there is stamped "National Labor Relations Board, Second Region, New York, dated May 19, 1960, 1:53 P.M."

May I also make an offer of proof that these pledge cards which have been marked for identification as Defendants' Exhibits F and G have been submitted and filed with the Second Regional Office of the National Labor Relations Board pursuant to its request following the filing of an unfair labor practice charge by the International Maritime Workers Union against the Ineres Steamship Company?

May I also make an offer of proof that the National Labor Relations Board, Second Region, is presently investigating the unfair labor practice charge to which I have referred and that in connection with that charge has requested Defendants' Exhibits F and G for Identification?

Also, may I make an offer of proof that these cards have been made available to us this afternoon by the National Labor Relations Board for the purposes of this hearing?

Mr. McAllister: Your Honor, we object to this whole line of proof as irrelevant.

The Court: Sustained.

[fol. 302] Your record is protected now, Mr. Ostrin.

Mr. Ostrin: That is all I am trying to do, your Honor.

By Mr. Ostrin:

Q. Mr. Wall, after you had engaged in this organizational campaign, did you have any meetings or discussions with any representative or representatives of the Ineres Steamship Company?

A. I met with Mr. Berlingeri.

Q. Do you recall when for the first time you met with Mr. Berlingeri?

A. April 13th at 39 Broadway.

Q. Was this meeting by pre-arrangement?

A. Yes, it was. It had been arranged through conversations aboard the *Victoria* or *Nassau*.

Q. Had you spoken with Mr. Berlingeri aboard either the *Nassau* or the *Victoria* prior to the meeting?

A. I had not, but the organizers had.

Q. Then they told you that there was a meeting arranged with Mr. Berlingeri?

A. Yes.

Q. Who was present at this meeting with Mr. Berlingeri?

A. The same two organizers that have been mentioned and a William Perry from the NMU and myself.

Mr. McAllister: I would like to have marked the notebook that Mr. Wall is consulting in connection with his testimony here.

The Court: Not at this time. He has a right to use any document he wishes to refresh his recollection. Later on you may call for its production.

Q. Who was present, sir?

A. Mr. Berlingeri, Mr. Perry from the National Mari- [fol. 303] time Union, the same two organizers, Chimiklas and Lioanjie, and myself.

Q. Can you tell us what was said?

The Court: Will you excuse me for a minute until I sign a few papers?

(There was a brief interruption at this point.)

Mr. Ostrin: Will you read the question?

(The pending question was read by the reporter.)

Q. (Continuing) At this first meeting with Mr. Berlingeri?

A. A number of things were discussed. We informed Mr.—

Q. Were you the spokesman, by the way, for the I. M. W. U.?

A. Yes. We informed Mr. Berlingeri that we represented a substantial number of crew members on the *Nassau* and

Victoria and that we were desirous of entering into collective bargaining negotiations and the discussions took place around this. He expressed some concerns or some questions from his side and we and we attempted to—

Q. Mr. Wall, instead of saying he expressed concern, which is a conclusion, will you tell us what he said?

A. He said that he was afraid if the employees of his two vessels joined an American Union, they would become involved in sympathy strikes with the Americans—

Q. By the way, did he refer to the I. M. W. U. as an American Union?

A. Yes.

Q. He referred to it as an American Union, right?

A. Yes.

Q. All right.

A. He expressed the fear or stated that a demand for [fol. 304] American wages would tend to drive him out of business, and he could not pay American wages and conditions. He wanted to know if each time the vessel came in, if the organizers would be aboard the vessel, and if he had to answer to the organizers.

Q. This is assuming that there was a contract with your Union, is that how these questions came about?

A. This was even prior to the contract.

Q. All right.

A. We answered from our side that the question of strikes was usually entered into agreements, that we had provisions for no strikes in the contracts, and that it was certainly not our purpose to drive him out of business, and that on the question of grievance procedures, we would be glad to work out a grievance procedure so that the grievances would be handled long before they reached his office.

Q. Did you give him an idea as to how grievances could be handled on a ship?

A. Yes, we did, and we submitted language covering that.

Q. By the way—

Mr. McAllister: Your Honor, I have been listening to this, and at this point I would like to object to this whole line of proof as to the discussions between these parties on

this subject. It seems to me to be irrelevant to any issue that is before this Court with respect to this picketing.

The Court: That is what I think, in line with my earlier disposition. What you are attempting to do here, Mr. Ostrin, it is quite clear to me, is to build up a case that will fit into the pattern of *Marine Cooks* and *Stewards*.

Mr. Ostrin: I think we have a right to do that, your Honor.

[fol. 305] The Court: You have a right to do that if it is a fact, but up to now—

Mr. Ostrin: I think it is, but, apparently, we are not being permitted to develop that, your Honor. I respectfully submit that this does fall within the Marine Cooks and Stewards case and that we should have the right to adduce evidence which would show that conditions aboard these vessels have an adverse effect upon the conditions of employment of American seamen as well as the conditions of employment of these seamen.

Mr. McAllister: Your Honor—

The Court: I will sustain the objection. Exception.

Mr. Ostrin: Do I take it then that your Honor will sustain all objections to this line of inquiry?

The Court: Yes.

Mr. Ostrin: Well, then, may I make the following offer of proof: I propose to prove further through this witness that at the meeting of April 13th between Mr. Wall and Mr. Berlingeri that following Mr. Wall's representations that the I. M. W. U. represented a majority of the seamen employed aboard the *Nassau* and *Victoria* and without challenging the I. M. W. U.'s majority status, Mr. Berlingeri stated that he knew that representatives of the I. M. W. U. had been active among the crew, that he had no objections to I. M. W. U.'s processing grievances on behalf of the crews, and that he requested merely that I. M. W. U.'s representatives when boarding the vessels first announce [fol. 306] themselves to the Masters.

I further offer to prove through this witness that at the same meeting, April 13th, while Mr. Berlingeri recognized the I. M. W. U. for the purpose of processing grievances, he expressed himself as being reluctant to enter into a

formal contract with the I. M. W. U. because of his apprehension of high American wages.

I also propose to prove through this witness that at the same meeting Mr. Berlingeri stated to Mr. Wall that he preferred to deal with an Italian Union and that he would be willing to negotiate an agreement with an Italian Union that the I. M. W. U. could then administer.

I further propose to prove through this witness that when this offer was made by Mr. Berlingeri it was promptly rejected by Mr. Wall.

I further propose to prove through this witness that another meeting was had with Mr. Berlingeri at his office on May 4, 1960, at 39 Broadway, during which meeting Mr. Wall again pointed to the fact that the I. M. W. U. represented a majority of the seamen employed aboard the *Victoria* and the *Nassau*, and that again at this meeting Mr. Berlingeri, without challenging the majority status of the I. M. W. U., unequivocally stated that he preferred to deal with an absentee Italian Union.

I further propose to prove through this witness that the meeting adjourned with the understanding that Mr. [fol. 307] Berlingeri would contact Mr. Wall further during the week but no later than May 10, 1960.

I further propose to prove through this witness that he heard nothing from Mr. Berlingeri on May 10, 1960, and that on May 13th, not having heard anything from Mr. Berlingeri, the Union elected to picket the S/S *Nassau* upon its arrival in New York with the picket sign that is now in evidence as Defendants' Exhibit D and D-1.

In connection with this offer of proof I would like to have marked for identification certain exhibits.

Mr. McAllister: Your Honor, would it be more orderly if Mr. Ostrin broke up his offer of proof? I mean up to this point we would object to it, but there may be other features of it—

The Court: He is just about to introduce some documentary evidence.

Mr. McAllister: I see. At least for the record, then, if Mr. Ostrin has completed his offer of proof, we would object to this whole line of questioning.

The Court: I have already sustained the objection.

Mr. McAllister: Up to the point of the strike itself, of course.

The Court: Yes.

Mr. Ostrin: I would like to have marked for identification copy of a letter addressed to Mr. Berlingeri under date of April 25, 1960, and following that another letter to Mr. Berlingeri under date of April 29, 1960.

(Two letters marked Defendants' Exhibits H and I for Identification.)

[fol. 308] Mr. Ostrin: May I have the witness identify both of these letters, please?

By Mr. Ostrin:

Q. Tell us what Defendants' Exhibits H and I for Identification are?

A. The letter of April 29th is a formal request to meet with Mr. Berlingeri for purposes of collective bargaining. The April 25th letter is a letter that preceded that. It was just simply a letter to meet, that we have discussed various factors of our first meeting with the crew, and that we would like to have a second meeting. The April 29th letter followed when there was no reply to the letter of the 25th.

Mr. Ostrin: I offer both of those in evidence.

Mr. McAllister: Your Honor, we regard these two letters as irrelevant but in the interest of saving time I have no objection to them.

The Court: All right, Mark them in evidence.

(Defendants' Exhibits H and I for Identification received in evidence and marked Defendants' Exhibits H and I.)

The Court: We will take a brief recess.

(Brief recess.)

(After recess.)

[fol. 309] SHANNON J. WALL resumed the stand and testified further as follows:

Mr. Ostrin: May I now have this telegram marked for identification, please?

(Telegram marked Defendants' Exhibit J for Identification.)

By Mr. Ostrin:

Q. Mr. Wall, I show you Defendants' Exhibit J for Identification and ask you what it is and whether or not you received it?

A. This is a wire from Mr. Berlingeri of the Ineres Line in which he says that he is—

Q. What is the date of the telegram?

A. The date is April 29, 1960.

Q. Is it addressed to you?

A. It is addressed to me.

Q. Did you receive it?

A. I received it.

Mr. Ostrin: I offer it in evidence.

A. (Continuing) He says it is agreeable to meet.

Mr. McAllister: Your Honor, we object to this whole line of the negotiations between the parties here.

The Court: I have sustained your objection. But you said some of the things you might permit to go into evidence.

Mr. McAllister: Your Honor, I didn't know that this was going to be a long line of documents, and so I will object to this one.

The Court: Sustained. Exception.

Mr. Ostrin: May I now have this telegram marked for Identification.

[fol. 310] (Telegram marked Defendants' Exhibit K for Identification.)

By Mr. Ostrin:

Q. I show you Defendants' Exhibit K for Identification and ask you what that is, whether you received it and what the date of it is.

A. The telegram is dated May 13th. It is addressed to me as Executive Director of the International Maritime Workers Union, 65 West 14th Street. It acknowledges receiving a telegram from me and it is simply signed "Incres Line."

Mr. Ostrin: I offer it in evidence.

Mr. McAllister: The same objection, your Honor.

The Court: The same ruling.

Mr. Ostrin: May I have this marked for identification.

(Telegram marked Defendants' Exhibit L for Identification.)

Q. I show you Defendants' Exhibit L and ask you to identify that, Mr. Wall?

A. This is a wire from Mr. Berlingeri via McKay Radio from the S/S *Victoria* at sea addressed to Marworker, the cable address of the Maritime Workers Union, in which he states he is returning Sunday and will contact—

The Court: He just asked you to identify the telegram.

The Witness: All right.

Mr. Ostrin: I offer it in evidence.

Mr. McAllister: Objection.

The Court: Same ruling.

[fol. 311] Q. Mr. Wall, did you meet with one of the attorneys for the Incres Steamship Company on the afternoon of May 13th?

A. Yes.

Q. Where did that meeting take place?

A. At the offices of Cooper, Ostrin & DeVarco.

Q. That is our office?

A. That is your office.

Q. Do you know the name of the attorney with whom you met?

A. Mr. Stevenson.

Q. In the course of the meeting did you have occasion to speak with Mr. Wolfson?

A. Yes, I did, by telephone.

Mr. McAllister: I object to this whole line of questions, your Honor.

The Court: I think so. Sustained.

Mr. Ostrin: In view of your Honor's ruling, may I at this time make a further offer of proof? The offer is as follows:

That on Friday afternoon, May 13th, Mr. Wall met with a Mr. Stephenson of the firm of Gray & Wythe, the then attorney for the Ineres Steamship Company, at my office, and in the course of the meeting which lasted some several hours there were several telephone conversations between Mr. Wall and Mr. Wolfson, the President of Ineres, that in the course of these telephone conversations Mr. Wolfson asked Mr. Wall whether he would agree to withdraw the picket line if Mr. Wall were to be assured by Mr. Berlingeri, then a passenger on the *Victoria*, which was at sea on the way in to New York, that promptly upon arrival of the *Victoria* in New York Mr. Berlingeri would commence negotiations in good faith with the I. M. W. U. for [fol. 312] a collective bargaining agreement on behalf of the unlicensed non-supervisory personnel employed on the *Nassau* and *Victoria*, that these assurances would be subject to any valid collective bargaining agreement between the Italian Union and the Company, if, in fact, one existed, that in the course of this proposal Mr. Wolfson indicated that if on the basis of the proposal Mr. Wall would withdraw the picket line, there would be no reprisals against the members of the crew; that Mr. Wall, after much discussion both with Mr. Wolfson and Mr. Stephenson finally agreed that such a radiogram would be sent to Mr. Berlingeri, and that, in point of fact, that radiogram, or a radiogram incorporating the proposals of Mr. Wolfson was sent to Mr. Berlingeri who was then aboard the S/S *Victoria*.

I would like, if I may, to call upon counsel to produce the original of that radiogram so that it might be marked

for identification and be offered in evidence as part of our record.

Mr. McAllister: Which radiogram was that, Mr. Ostrin? I am sorry, I didn't get that.

Mr. Ostrin: That was a radiogram sent to Mr. Berlingeri aboard the M/S *Victoria* at sea in the Caribbean on the evening of May 13, 1960, and I would like you to produce that radiogram.

Mr. McAllister: Your Honor, we have no objection to producing it but it would be subject to the same objection that we make to the whole line.

[fol. 313] The Court: Let us have it produced first.

Mr. Ostrin: It is the radiogram, a copy of which is annexed to Mr. Wall's affidavit as Exhibit C.

Mr. McAllister: What was the date of that, Mr. Ostrin?

Mr. Ostrin: May 13th.

Mr. McAllister: Is this it (handing paper to counsel)?

Mr. Ostrin: Yes.

I would like to have it marked for identification.

(Radiogram of May 13, 1960 marked Defendants' Exhibit M for Identification.)

Mr. McAllister: I understand this is part of your offer of proof, Mr. Ostrin, is that correct?

Mr. Ostrin: Yes.

Mr. McAllister: You have not yet completed your offer of proof?

Mr. Ostrin: No.

By Mr. Ostrin:

Q. Mr. Wall, I show you Defendants' Exhibit M for Identification and ask you whether that is the radiogram to which I have just referred?

A. Yes, it is.

Mr. Ostrin: I offer it in evidence.

Mr. McAllister: Is that offered as part of the offer of proof?

Mr. Ostrin: Yes, it is.

Mr. McAllister: The same objection, your Honor.

The Court: The same ruling.

[fol. 314] Mr. Ostrin: I further offer to prove through this witness that at or about midnight or shortly prior thereto on May 13th Mr. Berlingeri replied to Defendants' Exhibit M for Identification accepting Mr. Wall's proposals with the proviso that he would negotiate with the I. M. W. U. if the ITF were to grant it jurisdiction at the forthcoming meeting of the ITF in London.

Mr. McAllister: Your Honor, we renew our objection.

Mr. Ostrin: It is an offer of proof.

Mr. McAllister: And we object to it.

The Court: The same ruling. Sustained.

Mr. McAllister: On the same grounds.

The Court: Sustained.

Mr. Ostrin: This is part of my offer of proof, your Honor.

And as further part of my offer of proof, I refer to Exhibit B attached to Mr. Wall's affidavit verified the 17th day of May 1960, which is a radiogram addressed to the National Maritime Union by the Secretary of ITF on May 16th, I think it is, confirming that the jurisdiction for vessels Nassau and Victoria should be with the United States Maritime Union.

Mr. McAllister: Your Honor, I object again and I would like to ask that this whole proffer of proof be terminated. It is all the same thing. It is a line that the Court has ruled on a dozen times already and Mr. Ostrin persists in continuing with it. It seems to me the principle has been established by this Court.

The Court: I cannot stop him from making an offer of proof to protect his record.

[fol. 315] Mr. Ostrin: That is all I am doing, your Honor, all I am attempting to do.

I further offer to prove through this witness that meetings were held between him and Mr. Berlingeri on Monday, May 16, and thereafter, concerning the union's demands for recognition and a collective bargaining agreement, and that one meeting was held as recently as Wednesday, May 18th, following the session in court.

I further propose to prove through this witness, or offer to prove through this witness that Mr. Berlingeri in

the late afternoon or early evening of Wednesday, May 18th, informed Mr. Wall that he would give him the company's answer with respect to the union's demand for recognition and a contract after ten o'clock on the morning of the following day, which would be Thursday, May 19th, I believe the morning, and which your Honor was to rule on defendant's motion to dismiss the proceedings for lack of jurisdiction. This was a promise which was given to Mr. Wall on Wednesday evening, and following your Honor's ruling with respect to the motion to dismiss on Thursday morning of last week, which was May 19th, I believe, Mr. Wall heard nothing further from Mr. Berlingeri.

Mr. McAllister: The same objection, your Honor.

The Court: The same ruling.

Mr. Ostrin: May I just have a moment, your Honor?

The Court: Yes.

[fol. 316] Mr. Ostrin: That is all I have of this witness, your Honor.

Cross examination.

By Mr. McAllister:

Q. Mr. Wall, who is the treasurer of the International Maritime Workers Union?

A. Who is the treasurer?

Q. Yes.

A. There is none as such.

Mr. Ostrin: Objection as being immaterial and irrelevant. The question of service has already been ruled upon by your Honor.

The Court: All right; sustained.

Q. Are there any officers other than the three officers listed in Article 5 of your charter, to wit, the two co-chairmen and the executive director?

A. No, sir.

Mr. Ostrin: Objection.

The Court: I will allow that.

Mr. Ostrin: The document speaks for itself.

The Court: I will allow it.

Q. Mr. Wall, you use the expression, "Runaway Ships." Is that correct?

A. Yes.

Q. What do you mean by that?

A. A vessel that is running away from the country of ownership, from the responsibility of the country of ownership.

Q. Take these two vessels with which we are here concerned. Were they ever under the American flag?

Mr. Ostrin: He answered that. I think he said no.

[fol. 317] The Court: He said before they were not.

Q. So they didn't run away from the American flag?

A. They did not.

Mr. Ostrin: Objection, on the ground that it is argumentative.

The Court: It is not argumentative.

Mr. Ostrin: He has already testified that it had no connection with the country of ownership. I submit that answers it.

The Court: All right.

Q. Mr. Wall, when you undertook to organize the crews of these two vessels, did you know the ownership of these vessels?

A. Not clearly, no.

Q. Did you make any inquiry into the ownership of these vessels?

A. Yes, we have.

Q. What inquiry did you make?

A. To the limited resources that we have, we have inquired of the owners themselves. We have gone to Lloyd's Registry. We have looked at the articles, the Bank of American loans, and so forth, and we have not gotten much beyond what has been testified here, that Mr. Berlingeri is the president and that there are other interests.

Q. When did you commence your inquiry into the ownership of these vessels?

A. When we first started boarding them, when we were approached by the crew, we initiated our inquiries.

Q. In understood that you testified that you commenced your efforts to organize these crews in February?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. What inquiry had you made prior to the commencement of your efforts at that time?

A. None in February.

[fol. 318] Q. None whatsoever?

A. No.

Q. What did you think the ownership to be?

A. I had no thoughts on it. The vessel was trading between New York and the Caribbean on a constant cruise, and the men came to see us. Our organizers went aboard. We found conditions that we thought made it ripe for organizing. We started our organizational efforts.

Q. You knew the crew was wholly alien, however, did you not?

A. Yes, yes.

Q. I understood you to testify that one of the purposes of your union was to save the jobs of American seamen, is that correct?

A. That is correct.

Q. Did you have that in mind in your efforts to organize the crews of these two vessels?

A. Yes, we did.

Q. How did you propose to save the jobs of American seamen by organizing the alien crews of these two vessels?

A. We hoped to bring their wages and conditions up a great deal, or to the best of our ability, and thereby lessen the differential between the American seamen and the seamen aboard this vessel, or these vessels.

Q. How would that save jobs of American seamen?

A. We have found the vessels in the main transferring to foreign flags because of lower wages and conditions.

Q. And that deprives American seamen of jobs?

A. Correct.

Q. Did you know that these vessels had never been trans-

ferred from the American flag? That is already a matter of record here?

A. Did I know when we first made contact that they had not?

Q. Yes.

A. No. We knew that the vessel was —

[fol. 319] Q. Now that you have learned that these vessels have never been transferred from the American flag, and that they are foreign owned, as has been testified here, how do you propose to save jobs of American seamen with respect to these vessels?

A. I think it is clear we intend to raise the wages and conditions of these men.

Q. Of the alien seamen?

A. Yes.

Q. How does that protect the jobs of American seamen?

A. They are in direct competition with American vessels, the Grace Line in particular, and also to a lesser extent the Moore McCormack.

Q. I still don't understand, Mr. Wall, how that protects the jobs of American seamen, unless you simply pick these Italian seamen off these vessels and give the jobs to American seamen.

A. We feel that the organizing of unorganized vessels is the exact same thing as any man in the garment industry would organize an unorganized shop longside of him, that this protects the jobs and conditions of the unionized members.

The Court: Are you trying to say that if the wages of these alien seamen are brought up to the standard of American seamen, then there would not be a tendency on the part of any other owner of a ship to want to transfer his ship to a foreign flag?

The Witness: I think it would be less profitable for him to do that. And this is a long range program. This is not two vessels. These two vessels are part of a number of vessels.

The Court: Of course, as far as these two vessels were concerned, they didn't cost American seamen their jobs, because these ships were never under the American flag, and [fol. 320] never hired American seamen, isn't that correct?

The Witness: I don't know whether the Grace Line, who is their direct competitor, whether they would have another vessel in competition if they didn't have these two. They might have two more vessels in their run. Incres is running pretty much to capacity in passengers. There must be a need for Americans to travel to the Caribbean. If it was not profitable for them to be there, if their differential was not as great, perhaps Grace Line or other American companies would participate to a greater degree in this Trade Route 4, the essential trade route so designated by the Maritime Commission.

Q. There would be more jobs then, Mr. Wall, if the Incres Line was not in this business at all?

A. Well, I am not in the steamship business. I am only a union official. But I assume with Incres Line running to near capacity in passenger trade, that if they were not in this business, there was room for someone else, more vessels.

Q. American flag vessels?

A. Presumably.

Q. So it would be to your advantage if the Incres cruise ships were not in this business?

A. It would be—

The Court: That is all he is saying.

A. (Continuing) It would be to our advantage if there were no other ships but American, yes.

The Court: I tried to protect you, but you wouldn't let me.

[fol. 321] Mr. McAllister: No further questions, your Honor.

Mr. Ostrin: I have just one or two questions, your Honor.

Your Honor, I am trying to check to see whether the translation of Defendants' Exhibit A was actually received in evidence. I know that Exhibit A was. That is a letter that was circulated amongst the members of the crew. Before we close this hearing, I want to make sure that the translation which was handed up, has been given a number.

I don't seem to find it here. If you will bear with me, we can check it.

The Court: All right.

Mr. Ostrin: Apparently it was marked as A-1, but it seems to have gotten lost. I wonder whether we can have another copy marked as Defendants' Exhibit A-1, and then have it received in evidence as a translation of Defendants' Exhibit A?

Mr. McAllister: No objection, Mr. Ostrin.

(Letter received and marked Defendants' Exhibit A-1.)

Redirect examination.

By Mr. Ostrin:

Q. Mr. Wall, did the I. M. W. U. file an unfair labor practice charge against the Incres Line on May 16th?

A. Yes, we did.

Mr. McAllister: Your Honor, I object to this line of questioning, about filing charges with the National Labor Relations Board.

The Court: Yes. Sustained.

Mr. Ostrin: It is merely an offer of proof that the I. M. W. U. filed d unfair labor practice charge against [fol. 322] the company with the Second Region of the National Labor Relations Board on May 16th. Copy of that charge is annexed as an exhibit to Mr. Wall's affidavit in answer to the motion for a preliminary injunction.

The Court: All right.

Mr. McAllister: I make the same objection.

The Court: The same ruling. Sustained.

Mr. Ostrin: I would like, your Honor, to request Mr. McAllister whether he would stipulate that the document which I hold in my hand was distributed by the company to members of the crew. I would like to have it marked for identification, sir.

(Document marked Defendants' Exhibit N for identification.)

Mr. McAllister: Your Honor, I am unable to stipulate that. This document is written in Italian.

Mr. Ostrin: May we have the interpreter?

Mr. McAllister: Maybe you can tell me what it is, Mr. Ostrin.

Mr. Ostrin: Well, the gist of the article, or the part that I am interested in most is a report to the members of the crews of both the *Nassau* and *Victoria* that in the course of these proceedings I, as attorney for the I. M. W. U., argued that one of the reasons for the I. M. W. U.'s attempt to organize these vessels is to preserve the wages, hours, working conditions, and jobs of American seamen. I am going to offer this leaflet in evidence, if Mr. McAllister [fol. 323] doesn't want to stipulate, after a foundation is laid for it, to establish that the company is reporting to the members of its crews that one of the main reasons we are organizing the crew members of the *Nassau* and *Victoria* is to preserve American wages, hours, and working conditions and to protect American jobs for American seamen. I want to show that this is not only a recognition by the company, but that the company is making this known to the members of its crews. I submit this bears on the Court's decision in the Marine Cooks & Stewards, and I would like very much to have either the entire leaflet translated or those parts in which I am interested—

The Court: I cannot pass on anything in a foreign language, because I cannot read it.

Mr. Ostrin: We would like to have an interpreter here.

The Court: I think you had better get it translated. That is the best way to do it.

Mr. Ostrin: We can get it translated, either by the interpreter, or by an official translator. That is going to take time. I thought in the interests of expedition, just as Mr. McAllister called upon the court interpreter to read portions of the contract, we might do likewise with the court interpreter.

Mr. McAllister: Your Honor, may I just ask Mr. Ostrin, is this the translation of the statements made by him to this Court as they appear on pages 125 and 126 of the transcript of the record?

[fol. 324] Mr. Ostrin: No, we haven't gone into this at at all. I would like this translated. I have been informed,

—your Honor, I realize that this is not evidence—by one of the seamen that this leaflet was distributed amongst the members of the crews of the *Nassau* and *Victoria*, point out that one of the reasons the I. M. W. U. is seeking to represent these crews, is to protect American jobs, wages, and working conditions, and what have you. I am not testifying on that. I would like to get this translated, and get the correct translation.

If we were able to have the interpreter translate portions of the contract, at the request of Mr. McAllister, I see no reason why we can't do the same with this.

The alternative to that, if we were to submit this to a translating bureau, an official translating bureau, would be that it might take us 24 hours to have it translated.

The Court: Are you finished with your case when you finish with this witness?

Mr. Ostrin: I have one more witness.

The Court: We will see if we can get the interpreter down. I would like to finish this tonight, if I can.

Mr. Ostrin: I think we can, your Honor, because the next witness is going to be relatively brief.

The Court: All right. While we are locating the interpreter, why don't you put the next witness on.

Mr. Ostrin: Surely.

(Witness excused.)

[fol. 325] Edilio Sabbione, residing on the SS. *Nassau*, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Ostrin:

Q. Mr. Sabbione, are you a member of the crew of the S. S. *Nassau*?

A. Yes, sir, I am.

Q. In what department are you employed?

A. Steward department.

Q. How long have you been employed aboard the S. S. *Nassau* as a steward?

A. November 26, 1958.

Q. Right up to the present time?

A. Up to the present time—up to the strike.

Q. Are you a member of any Italian Union?

A. No, sir.

Q. Is there a contract between the Italian Union and the Incres Line covering the people on the *Nassau?*

A. Not that I know of, sir.

Q. How long have you been a seaman?

A. Well, since December 1, 1958, when we sailed from Italy.

Q. You were a seaman before 1958?

A. No, sir.

Q. Before the war?

A. No, sir.

Q. Do you know whether the Italian Union represents or undertakes to represent seamen who work on ships other than those which fly the Italian flag?

A. No, sir.

Mr. McAllister: Your Honor—

The Court: He may answer if he knows.

Mr. McAllister: If he knows, yes.

The Witness: No, sir.

The Court: You don't know?

The Witness: No, sir.

Mr. Ostrin: He says he does know.

The Witness: They do not represent Italian seamen on foreign ships with a foreign flag.

[fol. 326] Q. Is that correct?

Mr. McAllister: Your Honor, I move that that be stricken until his knowledge as to the facts be first established.

The Court: No. I will allow that. He is speaking as of his own knowledge.

Q. As far as you know, does the Italian Union represent anybody other than seamen who work on Italian flag ships?

A. No, it doesn't.

Mr. McAllister: I object.

The Court: I don't think—

The Witness: No, sir. The answer is no.

The Court: Objection sustained.

Do you belong to an Italian Union?

The Witness: No, sir.

The Court: An Italian Seaman Union?

The Witness: No, sir. Your Honor, may I plead for an Interpreter. I would like to speak Italian.

The Court: You are doing all right.

The Witness: Being in the court, you see, the meanings of words between Italian to English could have different expressions, as a difference in the feeling. So I would like to have the interpreter.

The Court: You are doing all right. We are expecting him down here. But I don't think you need an interpreter.

The Witness: If it is possible, I would be very glad—

Mr. Ostrin: What he is saying, as I understand it, is that the meanings of words in English might have a different connotation that he gets in Italian.

[fol. 327] The Court: Do you know what a Union is?

The Witness: Yes.

The Court: Do you know what a member of a Union is?

The Witness: Yes.

The Court: You say you are not a member of an Italian Seamen's Union?

The Witness: I am not a member of an Italian Seamen's Union.

By Mr. Ostrin:

Q. Do you know whether the members of your crew ever approached the Italian Union to represent them?

A. Yes, I do.

Q. What was the reply that was received from the Italian Union?

A. We ain't got no jurisdiction to all this Italian seamen working under foreign flag ships.

The Court: They said that to you?

The Witness: To me, yes, sir. I mean the members some crew members, not myself.

Q. Were you with a group, is that right?

A. Yes, I was with a group.

Mr. McAllister: May I ask the reporter to read that? I just didn't hear it.

The Court: And you heard the Italian Union Representative say that?

The Witness: No. I heard some of the crew members from the SS. *Nassau* that they— .

The Court: I will have to strike it out.

[fol. 328] Q. When did you learn about the International Maritime Workers Union?

A. Around the middle of the month of March, March 15, March—I don't know.

Q. How did you hear about it?

A. I read in the newspaper about the deal that we are on board between one of our fellows—he was a pastryman, a baker, you know. He was sick. They wouldn't recognize—

The Court: All right. We have the Italian interpreter.

(The balance of the witness' testimony was through an Official Italian Interpreter as follows):

By Mr. Ostrin:

Q. Did you see representatives of the International Maritime Workers Union come aboard your ship?

A. I saw one, a representative of the Union, the National Maritime Union.

Q. What was the representative of the International Maritime Workers Union doing on your ship?

A. He was bringing some newspapers and he was asking how are things.

Q. Can you identify the newspapers that he brought on the ship?

A. The Pilot.

Mr. Ostrin: Will counsel concede that the Pilot is the publication of the National Maritime Union?

Mr. McAllister: Indeed so.

Q. About when was this that you first saw a representative of the International Maritime Workers Union?

A. When I came in contact, in personal contact with

[fol. 329] one of these representatives was May 6th, 6th of May.

Q. Did you ever see any representative of the International Maritime Workers Union distribute pledge cards like these, and I show you Defendants' Exhibit F for Identification?

A. You mean that day?

Q. That day or any other day.

A. No, I did not.

Q. Did you sign a pledge card?

A. Yes, sir, I did sign.

Q. When did you sign?

A. The 4th of April.

Q. Do you know whether other people signed pledge cards in your presence?

A. Yes, sir, in my presence, yes.

Q. Were there many such people who signed them or a few?

Mr. McAllister: Your Honor, we object to this line of questioning about signing up pledge cards. The pledge cards themselves have been excluded and I regard this as subject to the same objection.

The Court: I think so. Sustained. Exception.

Q. Were there any difficulties on the ship sometime in the month of April?

A. Many difficulties.

Q. Will you tell us about them, please?

A. In order to relate them, I have to go back to January.

Q. Well, will you go back to January?

A. In the first 15 days of the month—

Q. The first 15 days of the month—

Mr. McAllister: Your Honor, I would like to renew the objection that has been made as to complaints and [fol. 330] difficulties, whatever they may be.

The Court: I will sustain the objection. Exception.

I am taking the position, and I either stand or fall on the position I take, or you win or lose by that position. The higher court will have to do some corrective work, either of you or of me.

Mr. Ostrin: Well, then, may I just make a very brief offer of proof.

The Court: All right.

Mr. Ostrin: I propose to prove through this witness that in or about the month of April 1960, there were a number of grievances aboard the SS. *Nassau* which stemmed from incidents occurring sometime in January, all involving some defective boiler which resulted in more overtime on the part of the members of the crew, with no compensation therefor.

Briefly, we offer to prove through this witness that because of this defective boiler the vessel arrived later in port and in the interest of a faster turn-around, so that the vessel might go back to the Caribbean, the members of the crew were required to work long hours of overtime without being compensated therefor.

I also propose to prove through this witness that the members of the crew of the *Nassau* were very desirous of being represented by the International Maritime Workers Union, that they signed pledge cards, that is, the majority of them did, that the crew had been informed of a pro-[fol. 331] posed meeting to be held on or about May 10th with Mr. Wall of the I. M. W. U. and Mr. Berlingeri of the company concerning the negotiations of a contract, and that this meeting was to be held while the *Nassau* was at sea.

I further propose to prove through this witness that the members of the crew at a meeting had decided that unless some definitive action were taken at this proposed meeting on May 10th or 12th, 1960, that the crew would strike, that they would walk off the ship; that the crew was no longer going to pay any attention to promises of negotiating, that the crew wanted recognition of the International Maritime Workers Union as its collective bargaining representative and wanted a contract in its behalf.

I further offer to prove through this witness that upon the arrival SS. *Nassau*—

(There was an interruption at this point.)

Mr. Ostrin: May I have the last part of my statement read.

Mr. McAllister: Your Honor, the offer of proof has been

rambling along covering many different topics, and I am wondering if it wouldn't make it more orderly if Mr. Ostrin would break it down as he goes along. There may be some features of this to which no objection will be made.

The Court: That would be desirable, if it can be done.

Mr. Ostrin: It is all right with me, your Honor, except it appears that this entire inquiry is being objected to [fol. 332] and the objections are sustained, but I can ask question for question.

Mr. McAllister: But, your Honor, there are times when the offer of proof deviates from the area of objectionable evidence, and we may—

The Court: Go ahead with your offer of proof.

Mr. Ostrin: What was the last thing I said?

(The following was thereupon read by the Court Reporter:

"I further offer to prove through the witness that upon the arrival of SS. *Nassau* the decision was made by the members of the crew to take some definitive action at the meeting of May 10th concerning union recognition, and that the members of the crew would refuse to work.")

Mr. Ostrin: I further offer to prove through this witness that after the vessel had docked on May 13th and the picket line was observed, that the members of the crew continued to perform their regular duties until about five or six o'clock in the afternoon, and that when they were advised that negotiations between representatives of the union and the company were fruitless, that the crew walked off the ship in furtherance of this dispute for recognition and a contract.

Mr. McAllister: Your Honor, we have no objection to the latter part.

[fol. 333] Mr. Ostrin: We further offer to prove through this witness—and in deference to you, Mr. McAllister, I will see if I can clearly state it—

Q. On Saturday and Sunday, May 14th and 15th, were you, and were other members of the crew in your presence asked to go back to the ship and perform your regular duties?

A. Yes, sir.

Q. And what did you say to that request?

A. Being a delegate, I asked a majority of the people present if they want to go back on board the ship.

Q. And what did you say?

A. When somebody asked my personal opinion I said I represented them as a delegate, I must be impartial, my opinion should not be unbalanced; I am just mouth-piece of the majority.

Q. Did you say anything about your going back to work?

A. Yes.

Q. What did you say?

A. Because I heard a lot of voices, from that I got it they were in the majority and I gave my opinion and I said "I prefer to die than go back to the ship."

Q. Did you make this statement in the presence of the members of the crew?

A. Yes, sir.

Q. How many members of the crew were present?

A. Well, I cannot estimate exactly.

Q. About?

A. It was a sum I could say about 70, 80, or 90.

Q. When you said that you would rather die than go back on the ship, did these people say or do anything?

A. The shout from them was unanimous. It was a shout of approval of what I said.

The Court: How many trips had you made on the *Nassau* prior to this?

[fol. 334] The Witness: On this ship or all?

The Court: Since you started.

The Witness: Are you referring to this or last year?

The Court: This year or last year on this ship?

The Witness: 36 the last year and 17 this year, but I think one or two were cancelled—well, one was cancelled for engine trouble.

The Court: How many?

The Witness: 36 last year and 17 this year, and one was cancelled. About 60, I would say.

The Court: 60 trips in all, that is, round trips?

The Witness: Yes.

The Court: Nobody forced you to take a job on this boat; did they?

The Witness: No.

The Court: Then why did you suddenly come to the realization after arriving in New York on May 13th that you would rather die than go back on the same ship?

The Witness: It was because it was a question of honor, a point of honor.

The Court: Well, it took you a long time to get around to the point of honor. You took 60 trips.

The Witness: First there wasn't at that time an International Union who could defend us, who were away from our country.

And then, although I had my wages as steward on the ship and I could make more money with tips, still I was fighting because of the difference of conditions between this country and my country economically speaking.

[fol. 335] Mr. Ostrin: I might say, your Honor, that one should remember and read the history of labor strife in this country, and he would find many, many presently organized workers, working for literally years in sub-standard conditions and wages, until the time was ripe for them to seek out union representation and recognition.

And even to this day there are a lot of people who sit and wonder, because they can't get anything else, and they work under conditions that they are dissatisfied with and wait for the proper time to seek out union representation and then fight for the improvements in wages and hours and other conditions.

I don't have anything further of this witness.

Mr. McAllister: No questions, your Honor.

(Witness excused.)

COLLOQUY

The Court: Mr. Interpreter, we have something for you to now interpret.

Mr. Ostrin: May we have a stipulation that this was prepared by the Ineres Line?

Mr. McAllister: Let us get it in English first.

Mr. Ostrin: All right; fine. May I have this translated, please, and I am referring now to Defendants' Exhibit N for identification.

The Official Interpreter: "Communique: May 21st, 1960.

"We call to the attention of the crew the following two official documents. The first document, extract from a decree of May 15th, 1960, of a Judge of the Supreme Court of the State of New York."

[fol. 336] Mr. Ostrin: I think we can stipulate that the first paragraph of Defendants' Exhibit N for identification is substantially the same as the last portion of the first paragraph of the show cause order with the interim restraining order which begins:

• • • • • • •

"from interfering in any way with the operation and management of the *SS. Nassau* and the *MS. Victoria,* from inciting, urging, or encouraging crew members to neglect their duties aboard said vessel; also from maintaining, supporting and directing or otherwise aiding or abetting the crew members who have left the said vessels and have refused to perform their duties thereon; also from picketing said vessels for any purpose."

Mr. McAllister: We will so stipulate, your Honor.

Mr. Ostrin: I would like more particularly the translation of the paragraph which follows:

The Official Interpreter: "This is from the minutes of the audience May 19, 1960, before the Supreme Court of the State of New York. Mr. Ostrin is the lawyer, counsel for I. M. W. U. There is another correction that we wish to bring forth in this decree."

Mr. McAllister: I just wanted to say again we would be glad to stipulate that this is a translation of pages 125 and 126 of the proceedings before this Court on Thursday, May 19th, being the statement that Mr. Ostrin made to this Court at that time.

Mr. Ostrin: May we show pages 125 and 126 to the interpreter and if he says that is what it is it is all right with me.

The Official Interpreter: That is right.

Mr. Ostrin: Supposing I read this and you follow me with the translation. This is paragraph 2 of Defendants' [fol. 337] Exhibit N for Identification, Mr. Ostrin speaking, and I quote.

"One other correction, modification that we want made in this order. The last clause of the order says: Also from picketing said vessels for any purpose. Now it is quite clear, as your Honor observed, in referring to Marine Cooks and Stewards' case that American Seamen, American Unions, can certainly picket within the ambit of Norris LaGuardia, and I submit also within the ambit of our Section 876-A to protect the inferior wages and working conditions paid to foreign seamen employed aboard foreign flags, because necessarily the payment of such inferior wages, the granting of such inferior working conditions, have a real and substantial adverse effect upon the wages and conditions of American seamen and their jobs."

The last clause, the last few lines of the clause are underscored in the leaflet.

"Now, these vessels are in direct competition with American owned and American flag vessels that are engaged in the same business and that by virtue of their being in direct competition by reason of the fact that they can pay, that these foreign flag vessels pay lower wages, our cruise business has seriously suffered, as a result of which there has been a loss of jobs."

"Jobs" is translated in English in the leaflet.

"Now, certainly under Marine Cooks and Stewards we have a right to picket for that purpose."

Is that right?

The Official Interpreter: That is right.

Mr. Ostrin: I will accept that translation as appears in pages 125 and 126 of the transcript with a notation that the leaflet has underscored that portion of my statement [fol. 338] which begins with "Of necessity the payment of these low wages and pay and because of these bad conditions of work they have had a substantial bad effect upon wages and conditions of the American seamen and their jobs."

That portion is underscored.

Mr. McAllister: Does that conclude it?

The Official Interpreter: Up to here (indicating).

Mr. McAllister: There is a further paragraph.

Mr. Ostrin: There is another paragraph which we did not read. Do you want me to read it?

Mr. McAllister: Yes, I want it all.

Mr. Ostrin: We can have it all.

I am referring to page 126 and I will read my statement and you will check me on it:

"I may add also that the very reason, and we have the Constitution of the Union here, your Honor, the very reason that the I.M. W. U. was formed, and it is stated in its preamble, is to safeguard, to build up the wages of seamen employed Pan-Lib-Hon bound vessels—" there is an error in the transcript—"employed on Pan-Lib-Hon vessels and at the same time protect and safeguard wages, hours and working conditions and employment of American seamen," and that portion is underscored.

"American seamen are losing jobs literally by the hundreds because of the operation of these Pan-Lib-Hon vessels."

And that is underscored.

"And the Supreme Court said the American Unions can picket under the Norris LaGuardia Act to preserve their own wages, hours and working conditions."

The Official Interpreter: That is right.

[fol. 339] Mr. Ostrin: Now, do you want anything else read, Mr. McAllister? Will you concede that was a communication prepared by the company and caused to be distributed among the members of the *Victoria* and the *Nassau*?

Mr. McAllister: That is correct.

Mr. Ostrin: I offer it in evidence.

(Defendants' Exhibit N for Identification marked in evidence.)

• • • • • • •

[fol. 343] New York, N. Y., May 25, 1960.

Trial Continued

Appearances: (Same as previously.)

Argument.

The Court: Gentlemen, I have spent considerable time going over the record in this case and considering the briefs that have been submitted to me, one of which was just handed to me by the defendants, and I am pretty familiar with the situation. However, I do not want to foreclose any attorney if he cares to say anything further.

I would like you gentlemen, because of the pressure of time and the work that I have, to each limit yourselves to fifteen minutes in the light of the full and complete discussion we have had up to now.

I think the record ought to indicate that during the course of the hearing the parties stipulated that testimony taken may be considered by the Court as though taken at a full trial, and that a decision made one way or the other would be a final decision either for a permanent injunction or for a judgment in favor of the defendants.

Am I correct, gentlemen?

Mr. Ostrin: On the permanent injunction, yes.

The Court: Yes, on the permanent injunction.

• • • • • • •

[fol. 360]

PLAINTIFF'S EXHIBIT 1

Certificate of Permanent Registration No. 2-55 for the SS. *Nassau*, Showing She Has a Liberian Flag Official No. 527

(See opposite) ☞

The Republic of Liberia

Treasury Department

Official No
[illegible]
Radio Call and Signal Letters
[illegible]

Permanent Certificate of Registry

Number [illegible]

N A S S A U
(Name of Vessel)

Measured	, 19	*Service*	Passenger Liner
Rebuilt at	, 19	*No of crew, excluding master*	293
Remeasured	, 19	*Horsepower*	13000

IN PURSUANCE OF TITLE II THE LIBERIAN MARITIME CODE

[illegible] JORDAN *having taken and subscribed the oath required by law and having sworn that*

Name	*Occupation*	*Residence*	*Citizenship*
Ingres Steamship Company Ltd.	Shipowner	Monrovia, Liberia	Liberian

(is, ~~are~~) the sole owner(s) of the vessel called the N A S S A U *formerly called* [illegible]
of Monrovia, Liberia, whereof Francesco Perilli *(who has sworn that he) is a citizen of* [illegible]
(Home port)
and is at present Master, and that the said vessel was built in the year 1922 *, at* Newcastle-on-Tyne, [illegible] *of* Steel *as appears by*
Certificate of Measurement *and* Lloyd's Register of Shipping *having certified that the said vessel is*

(is, ~~are~~) the sole owner(x) of the vessel called the NASSAU formerly called [illegible]

of Monrovia, Liberia, whereof (Home port) Francesco Perilli (who has sworn that he) is a citizen of [illegible]

and is at present Master, and that the said vessel was built in the year 1922, at Newcastle-on-Tyne, [illegible] of Steel as appears by Certificate of Measurement (Document of measurement), and Lloyd's Register of Shipping (Name of person who measured) having certified that the said vessel is a Twin Screw Steamer (Kind and build of vessel); that she has Three decks, Two masts; that her register length is [illegible] feet her register breadth is 72.0 feet, her register depth 29.5 feet, her height [illegible] feet that she measures as follows

	Tons	100ths
Capacity under tonnage deck	8964	12
Capacity between decks above tonnage deck	2979	62
Capacity of enclosures on the upper deck, viz Forecastle 293.43; bridge and poop [illegible] break deck houses ~~and~~ 679.89, side 24.18, chart 10.15, radio 13.26 excess hatchways, [illegible] ght and st	2100	42
Gross tonnage	15043	96

Deductions:

Crew space,	1099.53	Master's cabin,	21.76		
Steering gear,	- - -	Anchor gear,	23.23	Boatswain's stores	100.00
Chart house,	10.15	Dynamo Space [illegible] engine and boiler,	69.5	Radiohouse	13.26
Ballast pump,	- - -	Propelling power (actual space,	2456.4		

Total deductions	4131	9
Net tonnage	10912	--

The following-described spaces, and no others, have been omitted viz. Forepeak, afterpeak, cofferdams, other spaces (except double bottoms) for water-ballast - - -, open forecastle - - -, open bridge, open poop, open shelter deck, cabins 173.25, companions 50.93; galley 276.93; skylights 194.97; wheelhouse [illegible] water-closets, anchor gear, condenser - - - donkey engine and boiler - - -; steering gear 30.67; light and air over propelling machinery [illegible] other machinery spaces [illegible]

And Francesco Perilli (Name of person countersigning certificate of measurement) having agreed to the description and measurement above specified the vessel has been duly REGISTERED under the laws of The Republic of Liberia.

ISSUED by Authority of the Government of THE REPUBLIC OF LIBERIA under my hand and seal, this [illegible] day [illegible]

DEPUTY COMMISSIONER OF MARITIME AFFAIRS OF LIBERIA

The Commissioner of Maritime Affairs

By George V. Mechlouri

Deputy Commissioner of Maritime Affairs (Title)

Issued at New York, New York, U.S.A.

Plff's. Ex. 1 (1)

[fol. 361] *Plaintiff's Exhibit 1*

(See opposite) ☞

ENDORSEMENTS

s.s. N A S S A U OFFICIAL NO. 2 7

Perm. Cert. No.2-[illegible]5, Issued January 1[illegible], 19

Amendment, dated September 11, 1959 to First Preferred Fleet Mortgage (recorded in Book PM 11, Page 181) increasing the total amount to $[illegible],000,000. plus interest and commissions and fees, and performance of mortgage and terms and covenants of the Agreement, as amended; and changing date of maturity to December 31, 1962. Endorsed at port of New York on January 19, 1960 at 3:10 P.M.,E.S.T.

Book PM 11, Page 329

COMMISSIONER OF MARITIME AFFAIRS

[illegible] OFFICER
OF THE [illegible]
OF THE REPUBLIC OF [illegible]

THE REPUBLIC OF LIBERIA

TREASURY DEPARTMENT

SECOND FLEET

PREFERRED MORTGAGE ENDORSEMENT

S.S. [illegible] 2

Name of vessel Official No.

Perm. Cert. No2- -Jan. 1 , 1 . NEW Y

(Document number, date, and port)

MORTGAGE DESCRIPTION

Mortgagor Incres Steamship Company, [illegible]

Mortgagee FIAT

Endorsed January 19 19 at [illegible] pm E.S.T.

Total amount, $1 49,7?9, [illegible] and fees and performance of mort[illegible] terms and covenants.

Date of maturity December [illegible] 19[illegible]

Discharge amount. Same as the [illegible] amount.

Port of New York, New York

Book [illegible], Page [illegible]

SEAL

[signature]

[illegible] OF THE REPUBLIC OF LIBERIA

MORTGAGE DISCHARGE

Port of

FIRST FLEET

PREFERRED MORTGAGE ENDORSEMENT

(1) PREFERRED MORTGAGE ENDORSEMENT

MORTGAGE DESCRIPTION

Mortgagor Incres Steamship Company, Ltd.

Mortgagee Bank of America

Endorsed December 2, 19 54 at 10:30 A.M. E.S.T.

Total amount $ 583,333.35 and interest from September 30, 1954.

Date of maturity June 30, 19 56

Discharge amount $ Same as the Total Amount

[illegible] New York

By George U. Harvey

[illegible] Page 95

MORTGAGE DISCHARGE

Port of NEW YORK

MAY 1 19 5[illegible]

The sum of $ 583,333.35

been paid on the above-described mortgage, the cer-

tificate of such discharge being filed in the office

of COMMISSIONER OF MARITIME AFFAIRS, REPUBLIC OF LIBERIA

, 19 56 , at 3:55 P.M. EST

PAGE 41

By Albert J. Rudert

Official No. 527

Republic of Liberia
Treasury Department

Permanent
Certificate of Registry

No. 2-55

OF THE

Twin Screw Steamer

CALLED THE

NASSAU

OF

MONROVIA, LIBERIA

1503 gross tons 4912

ISSUED AT

New York, New York, U. S. A.

January 14, 19 55

WHERE SURRENDERED

WHEN SURRENDERED

WHY SURRENDERED

MORTGAGE DISCHARGE

Port of

FIRST FLEET

(2) PREFERRED MORTGAGE ENDORSEMENT

MORTGAGE DESCRIPTION

Mortgagor Incres Steamship Company, Ltd.

Mortgagee Bank of America

Endorsed April 7, 19 [illegible] at 11:25 A.M. EST

Total amount $ $3,500,000. plus interest, commissions and fees, and performance of mortgage and agreement terms and covenants.

Date of maturity November 30, 19 62

Discharge amount $ Same as the total amount.

[illegible] New York

Book No. 11, Page 151

(SEAL)

By Albert J. Rudert

DEPUTY COMMISSIONER OF MARITIME AFFAIRS OF THE REPUBLIC OF LIBERIA

MORTGAGE DISCHARGE

Port of

, 19

The sum of $ has

been paid on the above-described mortgage, the cer-

tificate of such discharge being filed in the office

of

19 , at m.

(SEAL)

Plff's. Ex. 1 (2)

[fol. 362]

PLAINTIFF'S EXHIBIT 2

Certificate of Permanent Registration No. 65-60 for SS. *Victoria*, Showing She Has a Liberian Flag Official No. 1145

(See opposite) ☞

The Republic of Liberia

Treasury Department

Permanent Certificate of Registry

Official No. 1145

Radio Call and Signal Letters ELQK

Number 65-60

VICTORIA
(Name of Vessel)

Measured , 19
Rebuilt at , 19
Remeasured , 19

Service Passenger Vessel
No. of crew, excluding master 200
Horsepower 14000 B.H.P.

IN PURSUANCE OF CHAPTER 2, THE LIBERIAN MARITIME LAW

Reginald Francis Barnett *having taken and subscribed the oath required by law and having sworn that*

Name	*Occupation*	*Residence*	*Citizenship*
[illegible]	[illegible]	Monrovia, Liberia	Liberian

(is ~~are~~) the sole owner(s) of the vessel called the VICTORIA *(formerly called* DUNBOTTAR CASTLE *)*
of Monrovia, Liberia, whereof Francesco Perilli *(~~who has~~ sworn that he) is a citizen of* Italy
(Home port)
and is at present Master, and that the said vessel was built in the year 19 37 *, at* Dolfast N. Ireland *of* Steel *as appears by*

(is ~~are~~) the sole owner(s) of the vessel called the VICTORIA (formerly called DUNBOTTAR CASTLE)

of Monrovia, Liberia, whereof (Home port) Francesco Perilli (~~who has sworn that he~~) is a citizen of Italy

and is at present Master, and that the said vessel was built in the year 19 37 at Belfast N. Ireland of Steel as appears by Certificate of Measurement (Document of measurement), and Lloyd's Register of Shipping (Name of person who measured) having certified that the said vessel is a Motor Screw (Kind and build of vessel); that she has Two decks, One masts; that her register length is 539.50 feet, her register breadth is 71.1- feet, her register depth 37.79 feet, her height - - - feet; that she measures as follows

								Tons	100ths
Capacity under tonnage deck								11476	44
Capacity between decks above tonnage deck									
Capacity of enclosures on the upper deck, viz: Forecastle 209.32	bridge 226.12	poop - - -	break - - -						
house—~~closed~~ open - - -	side - - -	chart 10.25	radio 11.32	excess hatchways - - -	light and air 401.11			842	59
						Gross tonnage		11917	03
Deductions:									
Crew space.	1376.92	Master's cabin.	41.57	Battery L.r.	5.49				
Steering gear.	5.46	Anchor gear.	19.35	Boatswain's stores.	100.00				
Chart house.	10.25	Donkey engine and boiler.	516.1-	Radiohouse.	11.32				
Ballast pump.	- - -	Propelling power (actual space.	1983.21	).	4773.35				
						Total deductions		722	99
						Net tonnage		11[illegible]	--

The following-described spaces, and no others, have been omitted viz: Forepeak - - - ; aftpeak - - - ; cofferdams - - - ; other spaces (except double bottoms) for water-ballast 122.90 open forecastle - - - ; open bridge - - - ; open poop - - - ; open shelter-deck - - - ; cabins 2948.00 companions 93.9 ; galley 17.17 ; skylights 3.- ; wheelhouse - - - ; water-closets 91.31 ; anchor gear - - - ; condenser - - - donkey engine and boiler - - - ; steering gear - - - ; light and air spaces [illegible] 63.92 ; other machinery spaces 950.10

~~I~~ (Name of person making certificate of measurement) Francesco Perilli having agreed to the description and measurement above specified, the vessel has been duly REGISTERED under the laws of The Republic of Liberia.

ISSUED by Authority of the Government of THE REPUBLIC OF LIBERIA under my hand and seal, this 21st day of April, 19 60

The Commissioner of Maritime Affairs

By ALBERT J. RUDICK

DEPUTY COMMISSIONER OF MARITIME AFFAIRS (Title)

Issued at New York, New York, U. S. A.

Piff's. Ex. 2 (1)

[fol. 363] *Plaintiff's Exhibit 2*

(See opposite) ☞

FLEET
(1) PREFERRED MORTGAGE ENDORSEMENT

MORTGAGE DESCRIPTION

Mortgagor Incres Steamship Company, Ltd.

Mortgagee Bank of America

Endorsed April 3 , *19* 59 , *at* 10:25a.m. Rotterdam's time

Total amount $3,500,000. plus interest , commissions and fees, and performance of mortgage and Agreement terms and covenants.

Date of maturity November 30 , *19* 62 .

Discharge amount Same as the total amount

Port of Rotterdam

Book PM 11, Page 151

Amendment, dated September 11,1959 to above First Preferred Fleet Mortgage increasing total amount to $4,000,000. plus interest and commissions and fees, and performance of mortgage and terms and covenants of the Agreement, as amended and changing date of maturity to December 31,1962. Endorsed at port of London on January 14,1960 at 12:45 P.M.,GMT.

Book PM 11, Page 329

Second Amendment dated March 2,1960, amends the above First Preferred Fleet Mortgage as amended, hereto by adding to Section 19 (g) references to First and Second Amendments; Endorsed at port of New York on April 21, 1960 at 4:30 P.M.,E.S.T.

Official No. 1145

Republic of Liberia
Treasury Department

Permanent
Certificate of Registry

No. 65-60
OF THE

FLEET
(2) PREFERRED MORTGAGE ENDORSEMENT

MORTGAGE DESCRIPTION

Mortgagor Incres Steamship Company, Ltd.

Mortgagee FIAT

Endorsed January 14 , *19* 60 *at* ..45pm GMT

Total amount $139,779.85 and fees and performance of mortgage terms and covenants.

Date of maturity December 31 , *19* 65

Discharge amount Same as the total amount

Port of London

Book PM 11, Page 349

[SEAL]

commissions and fees, and performance of mortgage and Agreement terms and covenants.

Date of maturity November 30 , 19 62

Discharge amount Same as the total amount

Port of Rotterdam

Book PM 11, Page 151

Amendment, dated September 11,1959 to above First Preferred Fleet Mortgage increasing total amount to $4,000,000. plus interest and commissions and fees, and performance of mortgage and terms and covenants of the Agreement, as amended;and changing date of maturity to December 31,1962. Endorsed at port of London on January 14,1960 at 12:45 P.M.,GMT.

Book PM 11, Page 329

Second Amendment dated March 2,1960, amends the above First Preferred Fleet Mortgage as amended, dated by adding to Section 19 (a) references to First and Second Amendments; Endorsed at port of New York on April 21, 1960 at 4:30 P.M.,E.S.T.

Book PM 12, Page 57

ALBERT J. RUDICK
DEPUTY COMMISSIONER
OF MARITIME AFFAIRS
OF THE REPUBLIC OF LIBERIA

MORTGAGE DISCHARGE

Port of

, 19

The sum of has been paid on the above-described mortgage, the certificate of such discharge being filed in the office of

, 19 , at m.

[SEAL]

Official No. 1145

Republic of Liberia
Treasury Department

Permanent
Certificate of Registry

No. 65-60
OF THE

Motor Screw
CALLED THE

VICTORIA
OF

MONROVIA, LIBERIA

11,917 *gross* 7644 *net*
ISSUED AT

New York, New York, U. S. A.
April 21st , 19 60

WHERE SURRENDERED:

WHEN SURRENDERED:

WHY SURRENDERED:

ance of mortgage terms and covenants.

Date of maturity December 31 , 19 65

Discharge amount Same as the total amount

Port of London

Book PM 11, Page 349

[SEAL]

ALBERT J. RUDICK
DEPUTY COMMISSIONER
OF MARITIME AFFAIRS
OF THE REPUBLIC OF LIBERIA

MORTGAGE DISCHARGE

Port of

, 19

The sum of has been paid on the above-described mortgage, the certificate of such discharge being filed in the office of

19 , at m.

[SEAL]

Piff's. Ex. 2 (2)

[fol. 365]

DEFENDANTS' EXHIBIT A-1

Certificate of Accuracy and English Translation of Letter to Crew of Vessel "*Nassau*", Dated May 16, 1960

(Letterhead of LAWYERS' & MERCHANTS' TRANSLATION BUREAU)

CERTIFICATE OF ACCURACY
TRANSLATION FROM ITALIAN TO ENGLISH

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On this day personally appeared before me H. CASERTA who after being duly sworn, deposes and states:

That he is a translator of the Italian and English languages by profession and as such connected with the Law-
[fol. 366] yers' and Merchants' Translation Bureau;

That he is thoroughly conversant with these languages;

That he has carefully made the attached translation from the original document written in the Italian language, (on the official paper of the Lawyers' & Merchants' Translation Bureau); and

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

Subscribed and sworn to before me this May 17 1960.

HERTA BERTSCHE
Notary Public, State of New York
No. 41-0277200
Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1961

[fol. 367]

TRANSLATION FROM ITALIAN—HCAS

PHONE DIGBY 4-3570 CABLE ADDRESS INCRESLINE
TELETYPE NO. N.Y. 1-6058 TELEX NO. N.Y. 3680

INCRES LINE
INCRES STEAMSHIP CO. LTD.
INCRES LINE AGENCY INC.
GENERAL AGENTS
39 BROADWAY, NEW YORK 6, N. Y.

New York, May 16th, 1960.

To the CREW OF THE VESSEL "*Nassau*"

It is the desire of the Company to reach a prompt settlement (clarification) of the regrettable situation that has come up during my absence.

In some conversations held lately I had promised to some of you to take some of your requests into consideration, which requests, however, were not made entirely clear to me.

I want to inform you that upon my return on board and with resumption of the regular service, the terms and conditions of enlistment shall be fully those contemplated in the Italian Collective Contract at present in force (July 25th, 1959) for the enlistment of crews for passenger vessels. This means also that the redemption (?) of the navigation will be borne to the extent of 75% by the shipowner and 25% by the seamen.

These conditions are retroactive, namely your will be paid the arrears from January 1st, 1960, on.

I furthermore place myself at your disposal in order to setfle, by direct negotiations, any other possible requests [fol. 368] that may be submitted to not later than 12 noon on May 17th by the representatives of the various departments on board.

"Mr. OSTER (Avvocato della I.M.W.U.): - C'e' un'altra correzione o modifica che noi desideriamo sia apportata a questo decreto. L'ultimo paragrafo del decreto dice: (La Union dovra' astenersi) anche dal collocare picchetti presso dette navi per qualsiasi scopo".
Ora e' ben chiaro, come Vostro Onore ha osservato, con riferimento al caso Marine Cooks and Stewards, che i marittimi americani, i Sindacati (Unions) americani possono certamente mettere picchetti nell'ambito della Legge Norris-La Guardia, ed io ritengo anche nell'ambito della nostra Sez. 876 A, per protestare contro le basse paghe e condizioni di lavoro date a marittimi stranieri impiegati sotto bandiere estere, perche' necessariamente il pagamento di queste basse paghe e la concessione di tali deteriori condizioni di lavoro hanno un reale e sostanziale effetto negativo nei confronti delle paghe e delle condizioni dei marittimi americani e dei loro impieghi.
Ora queste navi sono in concorrenza diretta con le navi di proprieta' americana e di bandiera americana che sono impiegate nella stessa attivita'; e per il fatto di essere in diretta concorrenza e per il fatto che possono pagare - che tali navi di bandiera estera pagano - salari inferiori, i nostri servizi di crociera hanno sofferto gravemente ed in conseguenza di cio' si e' avuta una perdita di posti di lavoro (jobs).
Ora, in base al caso Marine Cooks and Stewards noi abbiamo certamente il diritto di mettere picchetti per tale scopo.

Io posso aggiungere che proprio la ragione - e abbiamo qui la Costituzione della Union - proprio la ragione per cui la I.M.W.U. e' stata creata, e cio' e' precisato nel suo preambolo, e' quella di difendere e di incrementare le paghe dei marittimi impiegati sulle navi Pan-Lib-Hon e allo stesso tempo proteggere e difendere le paghe, le ore e le condizioni di lavoro e l'occupazione dei marittimi americani. I marittimi americani stanno perdendo letteralmente centinaia di posti (jobs) a causa dell'esercizio di queste navi Pan-Lib-Hon. E, come ha detto la Suprema Corte, le Unions americane possono mettere i picchetti sulla base della Legge Norris-La Guardia per preservare le loro proprie paghe, ore e condizioni di lavoro."

Domani il Comandante illustrerà all' equipaggio il presente comunicato, nonche' il punto di vista della Società nella presente

Dal primo documento risulta l'illegalita' dell'azione intrapresa dalla I.M.W.U. a cui e' stato dato l'ordine di non interferire nelle operazioni delle navi della Incres.

Dal secondo risulta chiaramente per bocca dell'avvocato della I.M.W.U., quali sono gli scopi della I.M.W.U. e dell'agitazione in corso, cioe' combattere in tutti i modi le navi di bandiera liberiana panamense eccetera, per levarle da mezzo e far posto alle navi di bandiera americana in modo da dar lavoro ai marittimi americani.

Defts. Ex. N

I furthermore guarantee to you that no reprisals will be taken against those who have brought the *Nassau* to the present regrettable situation.

I pledge myself to guarantee all the above to those who will show up on board the *Nässau* to resume their regular service on May 16th, 1960, on or before 9 a. m.

THE PRESIDENT OF THE
INCRES STEAMSHIP CO., INC., LTD.

Signed: BERLINGERI
(VINCENZO BERLINGERI)

DEFENDANTS' EXHIBIT C

Crew Roll and Articles of Agreement

(See opposite) ☞

INCRES STEAMSHIP COMPANY, LTD.

Crew Roll and Articles of Agreement

L'anno 19 60 addì 5 del mese di aprile tra la **Incres Steamship Company, Ltd., Monrovia** e le sottonotate persone (i minorenni in possesso del regolare consenso), viene convenuto e stipulato quanto segue:

1. I sottoscritti dovranno prendere imbarco nel Porto di NEW YORK sul s/s NASSAU nella qualità specificata per ognuno di essi, e dovranno essere pronti a partire per qualsiasi destinazione, in ogni momento in cui riceveranno ordini in proposito dal Comandante della Nave o da chi ne farà le veci.

2. Le condizioni di lavoro del Capitano e dei membri dell'equipaggio sono regolate dalle leggi della Repubblica di Liberia. In quanto non contrastanti con tali leggi salvo quanto diversamente stabilito dal presente accordo valgono le norme del Contratto Tipo della Incres Steamship Company, Ltd.

3. Il presente contratto viene stipulato per la durata della stagione di crociera 196 - 196 e comunque per non oltre un anno.

4. Le paghe mensili in lire saranno quelle del suddetto contratto.

5. I compensi per il lavoro straordinario all'equipaggio, saranno pagati secondo il Contratto sopradescritto.

6. Il personale di camera verserà a favore dei servizi interni e del fondo inventari le seguenti somme:

   Personale addetto al bar 3% sugli incassi

   Personale addetto alle cabine e al salone
   $ 1.00 per passeggero adulto a crociera

   Personale addetto al Deck $ 25.00 a crociera

   Personale addetto al Lounge $ 6.00 a crociera

   L'ammontare di tali versamenti verrà destinato per il 65% ai servizi interni e per il 35% al fondo inventari.

7. E' facoltà del Capo Commissario di variare la destinazione del personale alberghiero ogni qualvolta ciò fosse a suo giudizio opportuno.

8. La Compagnia Armatrice tratterrà mensilmente il 10% della paga, emolumenti e indennità a cui potesse avere diritto il marittimo quale fondo di garanzia per quelle spese a cui potesse andare incontro come conseguenza dell'eventuale sbarco per volontà o colpa del marittimo stesso.

La presente convenzione di arruolamento avrà sempre

This 5 day of aprile 19 60 between **Incres Steamship Company, Ltd., Monrovia** and the persons mentioned hereunder (persons not yet of full age in possession of regular assent) it is hereby agreed as follows:

1. The undersigned shall embark at the port of NEW YORK on the s s NASSAU in the capacity as shown for each one of them, and shall be ready to sail for any voyage and any destination whatsoever, at any time, whenever they shall receive orders to such effect from the Master of the ship or whomsoever replaces him.

2. The terms of employment of the Master and the rest of the crew are governed by the laws of the Republic of Liberia. If not in contrast with said laws - except where herein provided to the contrary - the terms of the standard contract of Incres Steamship Company, Ltd for the employment of marine personnel will apply.

3. The present contract is being stipulated for the duration of the cruise season 196 - 196 , and in any case not exceeding one year.

4. The monthly wages in Italian currency shall be as contemplated in the above mentioned contract.

5. All overtime work shall be paid to crew members pursuant to the provisions of the above mentioned contract.

6. The Steward Department personnel shall pay in favour of the internal services and the inventory fund the following amounts:

   Bar Stewards 3% of proceeds

   Cabin and Dining Room Stewards
   $ 1.00 for each adult passenger

   Deck Stewards $ 25.00 for each cruise

   Lounge Stewards $ 6.00 for each cruise

   The amount of the above payments will be apportioned as follow 65% to the internal services - 35% to inventory fund.

7. The Chief Purser will be at liberty to change the assignment of the Steward Dept. personnel whenever he may deem it necessary.

8. The Company will retain monthly 10% of the wages, emoluments and indemnities to which the crew member is entitled, as guarantee against such expenses as he may incur, as a consequence of volontary discharge or for insubordination.

The present articles of agreement will remain in force

le paghe mensili in lire saranno quelle del suddetto contratto.

5. I compensi per il lavoro straordinario all'equipaggio saranno pagati secondo il Contratto sopradescritto.

6. Il personale di camera verserà a favore dei servizi interni e del fondo inventari le seguenti somme:

   Personale addetto al bar 3% sugli incassi

   Personale addetto alle cabine e al salone
   $ 1.00 per passeggero adulto a crociera

   Personale addetto al Deck $ 25.00 a crociera

   Personale addetto al Lounge $ 6.00 a crociera

   L'ammontare di tali versamenti verrà destinato per il 65% ai servizi interni e per il 35% al fondo inventari.

7. E' facoltà del Capo Commissario di variare la destinazione del personale alberghiero ogni qualvolta ciò fosse a suo giudizio opportuno.

8. La Compagnia Armatrice tratterrà mensilmente il 10% della paga, emolumenti e indennità a cui potesse avere diritto il marittimo quale fondo di garanzia per quelle spese a cui potesse andare incontro come conseguenza dell'eventuale sbarco per volontà o colpa del marittimo stesso.

La presente convenzione di arruolamento sarà sempre valida qualunque sia il Capitano al comando, qualunque sia la nave della Compagnia Armatrice e qualunque sia la destinazione.

Data lettura del Contratto della Incres Steamship Company, Ltd., che a tutti gli effetti si considera qui interamente trascritto nel suo testo, e del presente contratto, le parti li hanno pienamente confermati, sottoscrivendo con me Console della Repubblica della Liberia.

NOTA - In caso di contestazione fà fede il contratto redatto in lingua italiana.

Defts. Ex. C

... monthly wages in Italian currency shall be as contemplated in the above mentioned contract.

5 All overtime work shall be paid to crew members pursuant to the provisions of the above mentioned contract.

6 The Steward Department personnel shall pay in favour of the internal services and the inventory fund the following amounts:

Bar Stewards 3% of proceeds.

Cabin and Dining Room Stewards
$ 1.00 for each adult passenger

Deck Stewards $ 25.00 for each cruise

Lounge Stewards $ 6.00 for each cruise

The amount of the above payments will be apportioned as follow: 65% to the internal services : 35% to inventory fund.

7 The Chief Purser will be at liberty to change the assignment of the Steward Dept. personnel whenever he may deem it necessary.

8 The Company will retain monthly 10% of the wages, emoluments and indemnities to which the crew member is entitled, as guarantee against such expenses as he may incur as a consequence of volontary discharge or for insubordination.

The present articles of agreement will remain in force whoever may be the ship's Master, whichever may be the Company's vessel and whichever may be the ports of call.

Having read the contents of the Contract of Incres Steamship Company Ltd., which to all effects and purposes is to be considered hereabove fully transcribed and having read the present agreement, the parties have accepted and signed same before me, Consul General of the Republic of Liberia.

NOTE - For any difference that may arise in respect to the present Contract, the Italian text of same shall apply.

[fol. 370]

DEFENDANTS' EXHIBIT H

Letter from Shannon J. Wall to Dott. Vincenzo Berlingeri, President of Incres Lines, Dated April 29, 1960

April 29th, 1960

Dott. Vincenzo Berlingeri
President—Incres Lines
39 Broadway—Rm 1508
New York, N. Y.

Dear Dott. Berlingeri:

The majority of the unlicensed personnel aboard your vessels have designated the International Maritime Workers Union to be their collective bargaining representative.

This letter is a formal request upon you to meet with representatives of your Company for the purposes of collective bargaining.

Please be advised that the International Maritime Workers Union is prepared in cooperating with other interested parties to pursue its rights in all of the legal directions available.

We are available to meet with your representatives at your convenience and await your advice as to time and place.

Yours very truly,

Shannon J. Wall
Executive Director

SJW:jk
oeiu-344-afl-cio
cc: Mr. Cooper
cc: Mr. Miller

[fol. 371]

DEFENDANTS' EXHIBIT I

Letter from Shannon J. Wall to Mr. Berlingeri, President of Incres Lines, Dated April 25, 1960.

April 25th, 1960

Mr. Berlinger, Pres.
Incres Lines
42 Broadway
New York, N. Y.

Dear Sir:

I have been out of the country for sometime during the past weeks which solely accounts for the delay in my contacting you.

At our recent meeting in your office we discussed the subject of the I.M.W.U. and Incres Lines entering into collective bargaining negotiations. Although some of the problems were placed on the table for discussion, one point on which we were in unanimous agreement was that we should continue to meet in order to avoid misunderstandings that might tend to delay our ultimately reaching a mutually satisfactory agreement.

Therefore, it is with this in mind and after consulting with a majority of the crew aboard both vessels that I suggest a meeting early this week at a time and place acceptable to you. It is our opinion that there is a solution to the problems raised by both sides at our previous meeting and we request that you give this prompt consideration.

Awaiting your reply, I remain,

Sincerely yours,

SHANNON J. WALL
Executive Director

SJW:jk
oeiu-344-afl-cio

[fol. 372]

DEFENDANTS' EXHIBIT N

Document in Italian. Entitled "Comunicato"

(Translated, *supra*, at pp. 230-232)

(See opposite) ☞

C O M U N I C A T O

21 Maggio 1960

Si richiama l'attenzione dell'equipaggio sui seguenti due documenti ufficiali:

Primo documento: ESTRATTO DEL DECRETO EMESSO IL 15 MAGGIO 1960 DAL GIUDICE DELLA CORTE SUPREMA DELLO STATO DI NEW YORK:

"... viene debretato che la convenuta International Maritime Workers Union, i suoi membri, rappresentanti, procuratori e dipendenti e coloro che agiscono di concerto con essa o che cooperano con essa - ed ognuno di essi individualmente - per virtu' del presente vengono diffidati dall'interferire in qualsiasi maniera con le attivita' del pfo. NASSAU e della mn/ VICTORIA, e dall'incitare, far pressione o incoraggiare i membri degli equipaggi a non compiere il proprio dovere a bordo di dette navi, come anche dal mantenere, appoggiare o altrimenti assistere o essere complici dei membri dell'equipaggio che lasciassero tali navi o rifiutassero di compiere su di esse il proprio dovere, nonche' dal collocare picchetti presso tali navi per qualsiasi scopo ..."

Secondo documento: ESTRATTO DEL VERBALE DELL'UDIENZA DEL 19 MAGGIO 1960 DINNANZI ALLA SUPREMA CORTE DELLO STATO DI NEW YORK:

"Mr. OSTRIN (Avvocato della I.M.W.U.): - C'e' un'altra correzione o modifica che noi desideriamo sia apportata a questo decreto. L'ultimo paragrafo del decreto dice: "La Union dovra' astenersi anche dal collocare picchetti presso dette navi per qualsiasi scopo".
Ora e' ben chiaro, come Vostro Onore ha osservato, con riferimento al caso Marine Cooks and Stewards, che i marittimi americani, i Sindacati (Unions) americani possono certamente mettere picchetti nell'ambito della Legge Norris-La Guardia, ed io ritengo anche nell'ambito della nostra Sez. 876 A, per protestare contro le basse paghe e condizioni di lavoro date a marittimi stranieri impiegati sotto bandiere estere, perche' necessariamente il pagamento di queste basse paghe e la concessione di tali deteriori condizioni di lavoro hanno un reale e sostanziale effetto negativo nei confronti delle paghe e delle condizioni dei marittimi americani e dei loro impieghi.
Ora queste navi sono in concorrenza diretta con le navi di proprieta' americana e di bandiera americana che sono impiegate nella stessa attivita'; e per il fatto di essere in diretta concorrenza e per il fatto che possono pagare - che tali navi di bandiera estera pagano - salari inferiori, i nostri servizi di crociera hanno sofferto gravemente ed in conseguenza di cio' si e' avuta una perdita di posti di lavoro (jobs).
Ora, in base al caso Marine Cooks and Stewards noi abbiamo certamente il diritto di mettere picchetti per tale scopo.

Io penso assicurare che prenda la ragione e abbiamo qui la

...illustrerà all' equipaggio il presente
...punto di vista della Società nella

[fol. 374]

ORAL DECISION BY JUSTICE HENRY CLAY GREENBERG, MAY 25, 1960

The Court: (Greenberg, J.) Gentlemen, as I have said repeatedly, this case has given me considerable pause and concern, because, in a way, it presents, perhaps, a new principle of law, particularly in so far as the State Courts are concerned. In another way it presents nothing particularly new or novel from the standpoint of Labor management relations, except in so far as the principles and the facts are concerned, the relationship between the seamen and the Master of a ship and the relationship between the seamen of that ship and the American Union.

First let me state that when this case orginally started on the first motion made to dismiss because of lack of jurisdiction in the court the Court got the distinct impression that the defendant Union here urged strongly that it was in no way involved in this strike; that it did not call the strike, and that the seamen aboard the *Nassau* and the *Victoria* on their own volition initiated such acts as have been portrayed here in the course of the trial. Thereafter, while Mr. Wall was on the stand, and again this morning Mr. Ostrin, counsel for the defendants, has stated that the strike was called by an American Union. So I think we can start with the accepted proposition, in contradistinction to the position taken by the Union at the beginning—I hope I am not wrong in this—that the American Union, the defendant herein, has been the moving and motivating spirit in the organizing of the seamen on the S/S *Nassau* and the S/S *Victoria* and had been responsible [fol. 375] for the strike which was called and the ensuing picketing.

I have gone over this lengthy record, covering more than four hundred pages, and have tried strenuously to orient myself to the attitude of the Labor Union in this case, as well as the position taken by the plaintiff herein. I have carefully considered again the Benz case and the Marine Cooks & Stewards case, and I want to say to Mr. Ostrin that I have boundless respect for the judgments and opin-

ions and views of Judge Frederick Van Pelt Bryan, upon whose opinion in the Afran case he placed so much stress. However, as an umpire in a baseball game, in a sense, I am called upon to call the shots, to use an expression of Judge Learned Hand, as I see them. If there be error committed by me, that error may be corrected by a higher tribunal.

We must start out with the proposition, to be sure contested to some extent by the defendants, that the operation of the *Nassau* and the *Victoria* was a distinctly foreign operation. The evidence shows that the vessels were foreign owned, foreign controlled, and that the seamen aboard the two vessels were all concededly foreign nationals; that they were recruited abroad and that they undertook employment pursuant to agreement effected in a foreign jurisdiction. Also, these ships were flying a foreign flag that came into this country under foreign registry.

I am aware of the fact, of course, that the Incres Steamship Company has an agency in America, and that it is claimed by the defendants that this agency transformed the operation from a strictly foreign operation, at least to [fol. 376] a partial American operation. I cannot subscribe to this argument by the defendants in this case. True enough, Mr. Wolfson, of the American corporation, had a measure of control. True enough, there was a relationship between the president of the foreign company and Mr. Wolfson of the American company. The fact remains, nevertheless, that even though there was an American agency here, this corporation, Incres Steamship Company, Ltd., must be deemed, and the Court concludes, that it is a foreign company which had its control not only of the corporate affairs, but over the internal affairs, economic and otherwise, of the two ships, the SS. *Nassau* and the SS. *Victoria*.

I am unable to find that there is a dispute between an American union in furtherance of legitimate American trade union objectives, against Incres. I cannot find that there is a dispute between an American union in furtherance of legitimate American trade union objectives and an American corporation, to wit, Incres Line Agency, Inc. On the contrary, I think the record speaks overwhelmingly

in favor of the conclusion reached by the Court that this strike was undertaken in the first place, by an American union for the purpose of organizing foreign nationals bound under articles of an agreement with a foreign corporation on ships which were controlled by Masters who also were foreign. In the second place, it cannot be said that there is a labor dispute between an American union, either at common law in the purview of Section 876-a of the State Law or in the light of the Federal Labor Relations Act. Indeed there could not, on the basis of this, be a labor dispute between the instant parties.

[fol. 377] It seems clear to me, in spite of the studied effort on the part of the defendants to bring themselves within the arena or the orbit of the Marine Cooks & Stewards case, that there was not a fight or a contest on the part of an American union in furtherance of legitimate American trade union objectives. Mr. Wall on the witness stand was hard put to answer the questions addressed to him by counsel and by the Court to show how the organizing of the seamen on these two vessels would affect legitimate American trade union objectives.

May I say parenthetically at this point, and not by way of apology, or defense, that this Court has shown by many of its decided cases, it has demonstrated a complete sympathy for the aspirations and legitimate objectives of the American trade union movement.

In cases which have gone to the Court of Appeals and in one instance to the Supreme Court of the United States, this Court went a far way in protecting the right of Labor to conduct an organization picketing campaign for a period of almost two years. And while this Court has suffered a reversal at the hands of the Appellate Division by a divided Court, the Court of Appeals equally divided four to three, sustained the views this Court had advanced.

I mention this so that the defendants will know, as well as the plaintiff, that labor has been a deep and abiding concern with this Court. At the same time, as a sworn judicial officer I am compelled to dispose of these matters on the basis of the facts and on the law as I construe it.

Now, here we have a case which in my judgment, upon reflection and consideration, falls squarely within the four [fol. 378] corners of the Benz case and even within the general language employed by Mr. Justice Black in the Marine, Cooks and Stewards case. There the Learned Justice of the Supreme Court said in two places in his opinion:

> "The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict federal court jurisdiction in controversies involving labor disputes. Nothing was said or intimated in Benz that would justify an inference that because a state court has jurisdiction to award damages in labor disputes the United States Courts have the power to issue injunctions in like situation."

And again almost at the conclusion of the opinion the Justice said:

> "There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under state or federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now we come down to the real heart or meat of the case and that is this: Does an American Union consisting of American Nationals have the right and the power to instigate a strike, to organize foreign Nationals on a foreign registered boat and cause picketing to be thrown, in a sense, around these boats and thus interfere with the internal economy and affairs of these boats?

We have already alluded to the specific relationship which exists between the Master of a ship and the crew. And I think therein lies the great distinction between the [fol. 379] factual picture presented here and the analogy sought to be drawn by Mr. Ostrin in the case where a foreign National had come into this country and had gone into business and then had imported foreign Nationals

who were not citizens to conduct that business here. There is not that relationship which exists between a Master and a crew, where for the safety of the ship and the passengers the Master has the Supreme power to conduct its affairs without any interference by any outside agency, whether it be an American Union or some other agency.

These ships have come into this country and, true, are subject generally to our laws; health, labor laws, generally where certain requirements are made under the State law or the Federal law. But when we deal with the situation—and therein I draw a distinction which might be deemed by the defendants to be a very fine, thin and narrow one—where we come to deal with the matter of seeking to interfere, and that is precisely what happened here and there is no escape from it, with the internal management of a ship which has come into this port, with foreign Nationals, foreign owned, of a foreign nation. Does that American Labor Union have the right, I repeat, to organize the members of that ship; the crew the stewards and the others, and to cause a strike to be called at the pier? The answer of this Court is that it does not have that power under any of the decided cases drawn to the attention of this Court, as the Court itself construes those cases. If that is the fact, then obviously an act or any act on the part of the American Labor Union, in calling a strike of the seamen [fol. 380] and others on board these ships constituted an interference with the management and the economic affairs of that ship and resulted in a prima facie tort in so far as the ships themselves are concerned. In the view of this Court they had no right to go aboard that ship even with the permission of the Captain for the purpose of organizing the members of the crew and others. They had no right to call a strike and they had no right to picket this ship.

I base this conclusion not alone on the *Benz* case which would be sufficient, because there Mr. Justice Clark was careful to point out that in his research of the debate in Congress and the notes there taken that the purpose of the Norris-LaGuardia Act was to protect American seamen dealing with American business interests. That was

the central theme and the motivations for the enactment of that Act. Here, however, the situation is completely different. We are dealing with, and I regret to have to repeat this again, an attempt on the part of an American Union which is seeking, according to this record, not to protect the economic position of American seamen but is seeking to organize the members of the crew for its own purposes, that is, for the purposes of the defendant International Maritime Workers Union.

I have considered, although briefly, the supplemental memorandum submitted by the defendants but I am not persuaded that they have been able to place the facts in this case within the four corners of the ambit, to use Mr. Ostrin's word, of the Marine Cooks and Stewards case.

Mr. Justice Black was careful, as I said, in the disposition of the original motion, to point out the distinction be- [fol. 381] tween the Benz case and the facts in the Marine Cooks & Stewards case, and that very distinction is the basis for the disposition now being made by this Court.

I should like to allude to the decision of the Supreme Court in Southern Steamship Company against N. L. R. B., reported in 316 U. S. 31, a 1942 decision, wherein the Court held that seamen who engaged in a strike on board a vessel tied up at a dock, away from its home port, were not entitled to reinstatement by the N. L. R. B. following their discharge, and the Court specifically rejected the argument, as I have read the case, that the situation was different where the ship was tied to a dock. To all intents and purposes, while subject to American laws, it is still a foreign owned, foreign operated, foreign registered ship, and therefore was controlled by foreign laws in so far as the internal operation and management of the ships are concerned. Accordingly, this Court concludes that the defendants in this case had no right either under the Federal Act or the State Act, to call a strike or to picket the ships Nassau and Victoria. If they had no right to call the strike and to picket, they were interfering with recognized international rights under international treaties with the ownership of the ships Nassau and Victoria, and, further, this interference constituted a tort which this Court is not called upon to protect and should not protect.

I think that it would present a most intolerable situation if we were to permit or if the Courts were to permit an American union, however laudable the objectives may be, [fol. 382] and I think they are laudable, at least as shown by the articles of incorporation, or the constitution—I repeat, it would present an intolerable situation to permit an American union to interfere with the recognized rights of foreign nationals, of the crew, where a boat is foreign registered and foreign operated and controlled, even though that management is shared in part by an American agency resident in this country.

I find that there is no basis for the picketing in the light of the law as I construe it, and, accordingly, the Court grants the injunction, a permanent injunction, on the basis of the stipulation entered into between the parties.

You may settle findings and conclusions of law and judgment, although the Court states that its oral decision here rendered is in compliance with the appropriate provisions of the Civil Practice Act, with an appropriate exception to the defendants.

[fol. 383]

IN SUPREME COURT OF THE STATE OF NEW YORK

STIPULATION SETTLING CASE—June 15, 1960

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the foregoing case on appeal consisting of the transcript, exhibits and all papers referred to in the order and judgment dated June 7, 1960 contains all of the evidence given upon the trial, together with the exceptions of all parties, and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated: New York, N. Y., June 15, 1960.

Donovan Leisure Newton & Irvine, Attorneys for Plaintiff-Respondent.

Cooper, Ostrin & De Varco, Attorneys for Defendants-Appellants.

[fol. 384]

IN SUPREME COURT OF THE STATE OF NEW YORK

ORDER SETTLING AND FILING CASE—June 15, 1960

On the foregoing stipulation, the above case on appeal, which contains all the evidence and exceptions of all parties, is hereby settled and ordered on file.

Dated: New York, N. Y., June 15, 1960.

Enter

H. C. G., J.S.C.

[fol. 385]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7187-1960

Notice of Appeal

INCRES STEAMSHIP COMPANY, LTD., Plaintiff,

—against—

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants.

NOTICE OF APPEAL OF DEFENDANTS INTERNATIONAL MARITIME WORKERS UNION AND SHANNON J. WALL, TO THE COURT OF APPEALS—August 29, 1960

Sirs:

Please Take Notice that the defendants International Maritime Workers Union and Shannon J. Wall hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, two judges dissenting, entered in the office of the Clerk of the Court on July 11, 1960, and the judgment entered thereon

in the office of the Clerk of the County of New York on August 4, 1960, modifying in part and except as modified affirming the order and judgment herein of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on June 7, 1960, and defendants appeal from each and every part of said order of [fol. 386] Appellate Division and judgment entered thereon.

Dated: New York, New York, August 29, 1960.

Yours, etc.,

Cooper, Ostrin & De Varco, 655 Madison Avenue, New York 21, New York; Miller & Seeger, 400 Madison Avenue, New York 17, New York, Attorneys for Defendants.

To: Clerk of County of New York.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Plaintiff, 2 Wall Street, New York, New York.

[fol. 387]

In Supreme Court of the State of New York

County of New York

Index No. 7187-1960

Notice of Appeal

Incres Steamship Company, Ltd., Plaintiff,

—against—

International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, Defendants.

Notice of Appeal of Plaintiff to the Court of Appeals—September 9, 1960

Sirs:

Please Take Notice that plaintiff Incres Steamship Company, Ltd., hereby appeals to the Court of Appeals from

so much of the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of that Court on July 11, 1960, and the judgment entered thereon in the office of the Clerk of the County of New York on August 4, 1960, as modifies, on the law and the facts, and in the exercise of discretion, the order and judgment herein of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on June 7, 1960, by inserting the word "such" between the [fol. 388] words "any" and "purpose" in the second ordering paragraph of said order and judgment.

Dated: New York, New York, September 9, 1960.

Yours, etc.

Donovan Leisure Newton & Irvine, 2 Wall Street, New York 5, New York, Attorneys for Plaintiff.

To: Clerk of County of New York.

Cooper, Ostrin & De Varco, Esqs., Miller & Seeger, Esqs., Attorneys for Defendants, International Maritime Workers Union and Shannon J. Wall.

[fol. 389]

At a Term of the Appellate Division of the Supreme Court of State of New York, held in and for the First Judicial Department, at the Court House thereof, in the City of New York, on the 11th day of July, 1960.

Present: Hon. Bernard Botein, Presiding Justice; Hon. Charles D. Breitel, Hon. Francis L. Valente, Hon. James B. M. McNally, Hon. Harold A. Stevens, Justices.

Incres Steamship Company, Ltd., Plaintiff-Respondent,

—against—

International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, Defendants-Appellants.

ORDER OF MODIFICATION OF APPELLATE DIVISION, APPEALED FROM—July 11, 1960

The defendants-appellants, International Maritime Workers Union and Shannon J. Wall, having appealed to the Appellate Division of the Supreme Court from an order and judgment entered in the office of the Clerk of the [fol. 390] County of New York, on the 10th day of June, 1960, herein, and the said appeal having regularly come on to be heard on the 16th day of June, 1960, at a term of this court, and after hearing Cooper, Ostrin & De Varco and Miller & Seeger, by H. Howard Ostrin, Esq. of counsel, attorneys for defendants-appellants International Maritime Workers Union and Shannon J. Wall, and Donovan, Leisure, Newton & Irvine, by Breck P. McAllister, Esq., of counsel, attorneys for plaintiff-respondent Incres Steamship Company, Ltd., and due deliberation having been had thereon, and upon the majority and dissenting opinions of the Court, filed herein on July 6, 1960, it is

Ordered, Adjudged and Decreed that the order and judgment so appealed from be and the same hereby are modified on the law and the facts, and in the exercise of discretion, in the following respect:

The words "also from picketing said vessels for any purpose" in the second ordering paragraph are modified by inserting the word "such" between the words "any" and "purpose" so as to read "also from picketing said vessels for any such purpose" and except as so modified said order and judgment be and the same hereby are affirmed with costs to the plaintiff-respondent;

And it is Further Ordered, Adjudged and Decreed that the ordering paragraphs in the order and judgment appealed from as herein modified and otherwise affirmed shall read as follows:

Ordered, Adjudged and Decreed that the Court has jurisdiction of the cause and to grant the injunctive relief as [fol. 391] prayed for in the complaint herein and the said motion of defendants to dismiss the complaint be and the same hereby is denied;

And it is Further Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendants permanently restraining and enjoining the defendants, their successors, their members, agents and servants and those persons in active concert or participation with defendants who receive actual notice of this judgment by personal service or otherwise and each and every one of them from, on and after the 10th day of June, 1960, interfering in any way with the operation and management of the *SS. Nassau* and the *MV Victoria*, from inciting, urging or encouraging crew members to neglect their duties on board said vessels, also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon and also from picketing said vessels for any such purpose;

And it is Further Ordered, Adjudged and Decreed that the jurisdiction of the Court over the claim of plaintiff for damages and for such further and other relief requested in the complaint herein as may be just and proper be reserved for trial in regular course, and to that extent the claim is severed."

(Two of the justices dissent and vote to reverse and dismiss the complaint.)

Enter:

J. B. M. Mc

[fol. 392]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7187-1960

INCRES STEAMSHIP COMPANY, LTD., MONROVIA, LIBERIA,
Plaintiff,

—against—

INTERNATIONAL MARITIME WORKERS UNION, 265 West 14th Street, New York 11, New York, SHANNON J. WALL, 64 West Saddle River Road, Waldwick, New Jersey, EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants.

JUDGMENT OF MODIFICATION APPEALED FROM—August 4, 1960

The defendants International Maritime Workers Union and Shannon J. Wall, having appealed to the Appellate Division of the Supreme Court, First Department, from an order and judgment of the Supreme Court, New York County, made and entered in the office of the Clerk of the County of New York, on the 10th day of June, herein, denying defendants' motion to dismiss the complaint, permanently enjoining defendants from interfering in any way with the operation and management of the *SS. Nassau* and the *MV. Victoria*, from inciting, urging or encouraging crew members to neglect their duties on board said vessels, also from maintaining, supporting, directing or otherwise aiding [fol. 393] or abetting crew members who have left said vessels and have refused to perform their duties thereon, and also from picketing said vessels for any purpose, and severing and reserving plaintiff's claim for damages for trial in regular course, and the said appeal having regularly come on to be heard on the 16th day of June, 1960, and the said Appellate Division having duly made an order dated July 11, 1960; two of the Justices of said Court dissenting and voting to reverse and dismiss the complaint, a certified copy of which order, together with the papers

upon which the said appeal was heard, was filed in the office of the Clerk of the County of New York on July 15, 1960, and it appearing by said order that the Appellate Division, First Department, has ordered that the order and judgment so appealed from be modified on the law and facts, and in the exercise of discretion, by inserting the word "such" between the words "any" and "purpose" in the second opening paragraph, so as to read "also from picketing said vessels for any such purpose," and, except as so modified, that the order and judgment so appealed from be affirmed with costs of said appeal.

Now, on motion of Donovan Leisure Newton & Irvine, attorneys for the plaintiff-respondent herein, it is

Adjudged that the order and judgment so appealed from be and the same hereby are modified on the law and the facts, and in the exercise of discretion, in the following respect:

The words "also from picketing said vessels for any purpose" in the second ordering paragraph are modified by inserting the word "such" between the words "any" and [fol. 394] "purpose" so as to read "also from picketing said vessels for any such purpose" and except as so modified said order and judgment be and the same hereby are affirmed with costs to the plaintiff-respondent;

And it is Further Adjudged that the ordering paragraphs in the order and judgment appealed from as herein modified and otherwise affirmed shall read as follows:

Ordered, Adjudged and Decreed that the Court has jurisdiction of the cause and to grant the injunctive relief as prayed for in the complaint herein and the said motion of defendants to dismiss the complaint be and the same hereby is denied;

And it is Further Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendants permanently restraining and enjoining the defendants, their successors, their members, agents and servants and those persons in active concert or participation with defendants who receive actual notice of this judgment by personal

service or otherwise and each and every one of them from, on and after the 10th day of June, 1960, interfering in any way with the operation and management of the *SS. Nassau* and the *MV Victoria*, from inciting, urging or encouraging crew members to neglect their duties on board said vessels, also from maintaining, supporting, directing or otherwise aiding or abetting crew members who have left said vessels and have refused to perform their duties thereon and also from picketing said vessels for any such purpose;

[fol. 395] And it is Further Ordered, Adjudged and Decreed that the jurisdiction of the Court over the claim of plaintiff for damages and for such further and other relief requested in the complaint herein as may be just and proper be reserved for trial in regular course, and to that extent the claim is severed.

And it is Further Adjudged that the said plaintiff Ineres Steamship Company, Ltd., Monrovia, Liberia, recover of the defendants International Maritime Workers Union, 265 West 14th Street, New York 11, New York, and Shannon J. Wall, 64 West Saddle River Road, Waldwick, New Jersey, the sum of $178.74 the amount of its costs herein, as taxed, and that it have execution against said defendants International Maritime Workers Union and Shannon J. Wall therefor.

Judgment signed and entered this 4th day of August, 1960.

James McGurrin, Clerk.

[File endorsement omitted]

[fol. 396]

IN SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, First Department, June 1960

Bernard Botein, P. J., Charles D. Breitel, Francis L. Valente, James B. M. McNally, Harold A. Stevens, JJ.

2750

INCRES STEAMSHIP COMPANY, LTD., Plaintiff-Respondent,

vs.

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants-Appellants.

MAJORITY OPINION OF APPELLATE DIVISION—August 4, 1960

Appeal from an order of a Special Term of the Supreme Court, New York County (Greenberg, J.), and the judgment entered thereupon, both entered June 7, 1960, which denied defendants' motion to dismiss the complaint, permanently enjoined defendants and severed and preserved plaintiff's claim for damages for a later trial.

A. Howard Ostrin of counsel (Herman E. Cooper and Eugene N. Sosnoff with him on the brief; Cooper, Ostrin & De Varco and Miller & Seeger, attorneys) for Defendants-Appellants.

[fol. 397] Breck P. McAllister of counsel (Walter L. Stratton and Philip J. Loree with him on the brief; Donovan Leisure Newton & Irvine, attorneys) for Plaintiff-Respondent.

Breitel, J.:

The question in this case is whether an American labor union may strike a foreign ship engaged in foreign commerce while such ship is in an American port, and, if not, whether a state court may enjoin such activity.

After a trial, Special Term granted a permanent injunction. The union has appealed.

Plaintiff is a Liberian corporation, actually owned and controlled by Italian nationals. It owns two cruise ships, which are r[illegible]ered in Liberia and fly, as a flag of convenience, the [illegible]g of that nation. The ships are claimed to have Monrovia, Liberia, as their home port, although it is conceded that the ships have not been known to have visited that port. The ships, catering largely to American custom, generally ply the sea lanes between New York City and ports in the Caribbean. Their crews are of Italian nationality and are recruited under written articles in Italy. The crews take their leave, and the ships are refitted or repaired in Genoa, Italy, on annual European cruises.

Defendant union is called the International Maritime Workers Union. It was conceived in 1959 at a conference of maritime unions held in London, England, and was formed shortly thereafter by two American maritime unions. Its purpose is to organize foreign seamen employed in ships flying various foreign flags of convenience, [fol. 398] which ships are competitive with those that fly the American flag and maintain high labor standards.

The union picketed, organized, and eventually struck plaintiff's two ships while in New York City. As a result the sailings were cancelled. This action ensued and resulted in the permanent injunction which now bars the union from such activity.

There are some peripheral issues and facts raised in the case, but they are hardly determinative: The union stresses the American contacts of the ships by pointing out that their affairs are largely managed in New York City, by an agency corporation, controlled and owned by plaintiff, but incorporated in New York. It stresses too that the cruises run by plaint[illegible] originate in New York City and return there. Plaintiff, on the other hand, stresses various disputed acts committed by the union which it claims to be illegal, but which, on the analysis in this case, it is not necessary to reach.

There are some simple conclusions to be first derived, before the more difficult aspects of the case are considered.

First, the Liberian nationality of plaintiff and the Liberian registry of the ships should not be conclusive of the character of shipping involved. The National Labor Relations Board, in appropriate cases involving "American" ships flying foreign flags of convenience has so determined, and the conclusions are entirely persuasive (*Peninsular & Occidental S. S. Co.*, 120 N. L. R. B. 1097 [1958]; *Eastern Shipping Corp.*, N. L. R. B. Case No. 12—R C —415 [1959], CCH-NLRB Decisions ¶56,698 [1959-1960]). So, too, has the United States District Court in this district (*Afran* [fol. 399] *Transport Co.* v. *Nat. Maritime Union*, 169 F. Supp. 416 [Bryan, J.], in an especially well-considered opinion, cited with evident respect by the Supreme Court in *Marine Cooks Union* v. *Panama S. S. Co.*, *infra*, 362 U. S. 365). Looking beyond the flag of convenience, however, does not change the character of the ships here from foreign to domestic. The shipping is still foreign—Italian in fact—because of Italian ownership, Italian crews, Italian contracts of hiring, and because the ships are engaged in foreign commerce on the high seas. Quite a different case would be presented if the ships were used exclusively or largely on inland waterways, or for that matter, if one or more of the other factors mentioned were changed. This does not mean that a change in any of these factors would require a contrary result. It is that there would then be a doubtful question of applicability of the federal labor statute and the rule in *Garner* v. *Teamsters Union* (346 U. S. 485) and *San Diego Unions* v. *Garmon* (359 U. S. 236) would apply. (See *Dooley* v. *Anton*, N. Y. 2d).

Second, in the absence of federal preemption of the field by federal labor statutes or preclusion of jurisdiction by virtue of labor anti-injunction statutes, the striking or other interference with the internal management of the crew of a vessel away from its home port is illegal (*Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31). Such interference is illegal because it violates public policy, and, in the case of an American ship, is even a criminal act (U. S. Code, tit. 18, §§ 2192, 2193). Thus, in the *Southern S. S.* case, it was held that the National Labor Relations Board could not order the reinstatement of seamen discharged [fol. 400] for striking an American ship away from its

home port ev[illegible] though it had also found that the men had struck because of the employer's unfair labor practices in violation of the then National Labor Relations Act. The court said:

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority. We shall consider in a moment the nature and scope of the criminal sanctions imposed in case of revolt and mutiny. But it is worth noting here that the form of the 'shipping articles,' which the master and every member of the crew must sign prior to the voyage, has been carefully prescribed by Congress, and that these articles contain this promise: 'And the said crew agree . . . to be obedient to the lawful commands of the said master . . . and their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore . . .' U. S. C., Title 46, §§564, 713. On the other hand, workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability [fol. 401] to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country if destitute abroad. U. S. C., Title 46, §§651-692, 1131. It is in this setting of fact and law that we must test the validity of the Board's order of reinstatement." (38-39)

The court went on to find that "the strike was unlawful from its inception" (48). The policy underlying this princi-

ple in the law of the sea is one that has had recognition for a long time, and insofar as foreign ships are concerned, has special vitality because of the comity among nations (*cf.*: *Wildenhus's Case*, 120 U. S. 1; *Lauritzen* v. *Larsen*, 345 U.S. 571).

Third, apart from the question of public policy pervading foreign shipping, and particularly the law of the sea as to the management of a ship's crew, the union activity would be privileged. That is, the economic self-interest of American workers to protect themselves from the competitive depredations of others using foreign labor working under sub-standard conditions would provide just cause for the intentional economic injury directed to such competition (see, Frankfurter and Greene, The Labor Injunction, 24 *et seq.*; Forkosch, A Treatise on Labor Law, 398 *et seq.*; *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260). While most of the cases and most of the commentators have considered only domestic disputes, the same principle of justification which applies in the domestic dispute in reason and policy should apply to one involving [fol. 402] foreign commerce, provided of course, no other overriding policy or law makes the activity illegal.*

On application of but these three conclusions last discussed, the union's activity was wrongful and not privileged, because it interfered with the engagement and management of the ships' crews while the ships were away from the home port. For this purpose, obviously, Monrovia is not the home port, but neither is New York City, merely because the latter is the most important port in the traffic carried by the ships. For the purposes of this *de facto* Italian line, it is evident that Genoa in Italy is the home port.

But the discussion may not be concluded at this point. The questions still remain whether there has been federal

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* On this analysis, there is disagreement with the conclusion of the trial court that defendant union did not have an economic self-interest in seeking to organize plaintiff's ships, which interest might justify the union's economic activity, provided its methods did not fail of legality for other reasons, such as interference with the ship's discipline, secondary boycott, and the like.

pre-emption by virtue of the federal labor statutes and whether there are any jurisdictionally inhibiting labor anti-injunction statutes.

The Supreme Court has held that the National Labor Management Relations Act does not apply to foreign shipping. In *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138), the court said, referring to the federal LMRA:

> "The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does [fol. 403] not 'cover a dispute between a foreign ship and its foreign crew' . . .
>
> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees." (142-144)

Later, in *Marine Cooks Union* v. *Panama S. S. Company* (362 U. S. 365), the court, speaking of its holding in the *Benz* case, said:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not bar the jurisdiction of state courts in that field."

Notably, the Supreme Court did not hold that there was a Congressional abstention from regulating in the field, so that there might be a preemption by silence, that is, an intention to leave the area of foreign shipping untrammelled by the several regulatory prohibitions and protections provided in the federal statute. Instead, it held that

Congress did not intend to apply the federal statute at all to foreign shipping. In consequence, the rule in *Garner* v. *Teamsters Union, supra,* (346 U. S. 485) and *San Diego Unions* v. *Garmen, supra,* (359 U. S. 236) is similarly inapplicable.

[fol. 404] True, in this case, as distinguished from the *Benz* case, the contact with the American port is regular rather than a one-instance occurrence. But, in both cases, the custom is American: in the one a cargo of wheat was to be taken on for transshipment, while in the other it consists of American passengers. The distinction is not sufficient to avoid the impact of the holding in the *Benz* case.* Moreover, until the Supreme Court narrows the major premise of the holding in the *Benz* case, a state court is concluded by it.

[fol. 405] In the airline field, there is an example of intentional Congressional abstention from applying a labor stat-

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* "But application of American statutes to labor relations on board foreign oceangoing vessels only transitorially in United States waters presents different problems and must be considered in light of principles of international law. Under settled doctrine, ports and adjacent waters are within the sovereign territory of the coastal state, which may, therefore, prohibit access by foreign vessels or permit entry only on such conditions as it may choose to impose. The absolute power of the coastal state is tempered, however, by the demands of comity among nations, which require it to exercise a high degree of self-restraint, particularly in matters involving the 'internal economy' of a foreign vessel.

"In determining whether to exercise its sovereign prerogatives, the coastal state must consider its self-interest shared with other nations—an 'inclusive' interest—in free commercial navigation in addition to the local interests which it seeks to protect by exercise of jurisdiction—its 'exclusive' interests—and the exclusive interests of foreign states. Regulation which constitutes an unreasonable interference with the internal economy of foreign ships may evoke defensive exercise of jurisdiction by other coastal states, thus subjecting oceangoing vessels to different laws in every port. For example, if a coastal state required that every vessel entering its waters employ a crew consisting entirely of the coastal state's nationals, other states might be forced to respond by comparable legislation, and mutually beneficial world trade would be brought to a virtual standstill." (Comment: The Flag-of-Convenience Fleet, 69 Yale L. J. 498, at 504-505.)

ute to events and relationships occurring in foreign commerce outside the continental United States. Thus it has been held that the Railway Labor Act (U. S. Code, tit. 45, §151 et seq.) does not apply to employees of American airlines engaged in flights between points outside the continental United States, based entirely and exclusively on legislative intention (*Air Line Stewards* v. *Northwest Airlines*, 267 F. 2d 170, cert. denied 361 U. S. 901; see also, *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685, 690, cert. denied 342 U. S. 849).

Consequently, it is not possible to find that the federal labor statute applies to foreign shipping or to the dispute which gave rise to this case. Hence, there is no federal preemption ousting the state courts of jurisdiction.

The federal labor anti-injunction statute (U. S. Code, tit. 29, §§101 *et seq.*) applies, of course, only to the federal courts. In *Marine Cooks Union* v. *Panama S. S. Co., supra*, (362 U. S. 365), it was held that the federal anti-injunction statute deprived federal courts of jurisdiction to enjoin illegal labor union activity in foreign shipping, even though the federal labor statute (LMRA) did not apply. In brief, it was held that the anti-injunction statute had a broader applicability than did the regulatory labor statute.

While it is true that New York's labor anti-injunction statute (Civ. Prac. Act, §876-a) was closely fashioned after the federal statute, and it is even arguable that it was intended to be even more restrictive of judicial labor injunctions, the New York statute has been much more nar- [fol. 406] rowly defined by the highest court of this State. It has been held that, in order for a dispute to qualify under the statute as a "genuine labor dispute", the dispute must have had a "lawful purpose". (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300, 305; *Dinny & Robbins, Inc.* v. *Davis*, 290 N. Y. 101; *cf. Florsheim Shoe Store Co.* v. *Shoe Salesmen's Union*, 288 N. Y. 188; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226; *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348; *Thompson* v. *Boekhout*, 273 N. Y. 390; see, *Mays Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331; *Arnold Bakers* v. *Strauss*, 1 A. D. 2d 604, 608, app. dis. 2 N. Y. 2d 721.) As a novel question one might

well quarrel with such a rendition of the statute, but the weight of authority is hardly escapable by an intermediate appellate court.

Consequently, it is concluded that no labor anti-injunction statute precludes the state court from enjoining the "illegal" activity of defendant union in striking plaintiff's ships and picketing for the purpose of inducing a breach of the articles of hiring of the ships' crews and the disciplines of the ships.

In reaching these conclusions one is aware of the substantial competitive effect of these foreign flag ships upon the condition of the American seaman. But the problem is one for Congress. It has the power to take whatever action is necessary, for the solution is largely limited only by its own discretion (*Benz* v. *Compania Naviera Hidalgo, supra,* 353 U. S. 138, 142). Indeed, the federal government has not hesitated in many areas to intrude on the "internal economy" of a foreign ship as a condition to entry into American ports (see, *Benz* case, *supra,* at pp. 144-145). It [fol. 407] is one thing for Congress to intrude in this field; it would be quite another for the courts to do so. This was expressed succinctly in the *Benz* case:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts" (147).

A state court can hardly say less; it should not say more.

On the foregoing reasoning the order and judgment granting a permanent injunction should be substantially affirmed. In one respect, however, it requires modification. The second ordering paragraph should be modified to provide that the words "also from picketing said vessels for any purpose" should read "also from picketing said vessels for any such purpose", the word "such" being necessary to

limit the injunction to the condemned activity as presented in this case.

Accordingly, the order and judgment should be modified, on the law and the facts, and in the exercise of discretion, to insert the word "such" in the second ordering paragraph as hereinabove mentioned, and should otherwise be affirmed, with costs to plaintiff-respondent.

All concur except Botein, P. J., and Stevens, J., who dissent and vote to reverse in opinion by Botein, P. J.

[fol. 409]

BOTEIN, P.J. (dissenting):

Plaintiff, a corporation organized under the laws of Liberia, operates two cruise vessels under the Liberian flag. All of plaintiff's officers and shareholders are foreign nationals; and the ships are manned by alien crews hired at Genoa, Italy. No Liberian citizen, however, plays any role in either the management of plaintiff or in the operation of its ships.

All of plaintiff's cruises originate in New York, and its passengers are principally Americans. Plaintiff occupies common office space in the City of New York with its agency, a New York corporation. Plaintiff's president is also an officer and director of the agency, which sometimes alone, sometimes jointly with plaintiff, provisions the ships, books passengers, schedules departures and arrivals, and attends to ships' repairs—all out of the New York office.

Defendant International Maritime Workers Union was formed recently by two large maritime unions affiliated with AFL-CIO. An avowed major purpose, recited in the preamble to the union's constitution, is to bring strong and responsible union representation to the crews of ships flying so-called "flags of convenience". Defendant union contends that plaintiff's ships fall into this category, and that their victimized crews are denied human dignity, [fol. 410] decent wages and working conditions. When plaintiff's vessels ply regularly in and out of New York, the union claims their substandard labor conditions also

pose a real menace to the preservation of the high, hard-won standards prevailing on American flag vessels under contract with American maritime unions.

Representatives of the union made contact with crew members aboard both of plaintiff's vessels, for the purpose of organizing them, to the end that they would be represented by the union. They also picketed both ships upon their arrival in New York Harbor and were successful in preventing their scheduled departures. The picketing at all times was orderly and peaceful—in fact, the pickets never exceeded three in number. Plaintiff served a summons and complaint seeking a permanent injunction and damages of defendant union and its executive director. Following trial an order and judgment were entered, denying defendants' motion to dismiss the complaint on the ground the court lacked jurisdiction over the subject matter, permanently enjoining defendants from interfering in any way with the operation and management of the two ships and from picketing them for any purpose and severing and reserving plaintiff's claim for damages for later trial.

In holding that jurisdiction resided in the state courts, the Justice at Special Term relied solidly on the 1957 decision of the Supreme Court in *Benz* v. *Compania Navie Hidalgo, S. A.* (353 U. S. 138), which he said was "squarely on all fours with the instant case". In the *Benz* case, as here, the vessel, a foreign tramp steamer, flew the Liberian flag, had foreign owners, and the crew complement was [fol. 411] composed of foreign nationals. Unlike the fact situation presented here however, the owners of the steamer in the *Benz* case had no office or agents in the United States, and the ship did not receive the major part of its business from American nationals nor visit an American port regularly; and after a single, initial, fairly haphazard contact with an American port the steamer left United States territorial waters and thereafter had no charter commitment to return. Again, unlike the instant case, in which a union has sought directly to organize foreign seamen on a foreign ship to preserve, among other things, American wage and working standards, in *Benz* the unions were interested

primarily in the internal economy of the ship and picketed out of sympathy for a strike of foreign seamen.

As the opinion itself indicates, the *Benz* case had rather special facts:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing." (353 U. S. at p. 142)

The compass of the *Benz* holding was recently outlined succinctly in *Marine Cooks & Stewards, AFL* v. *Panama Steamship Co.* (362 U. S. 365). In the latter case the Supreme Court said:

> [fol. 412] "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not preempt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law." (362 U. S. at p. 369)

The court in this later case was again confronted with the picketing of a Liberian ship, manned by an alien crew. In this situation, however, there was no labor dispute between the ship's employees and the ship's management. The picketing, carried on by an American union, was to protest the loss of AFL-CIO seamen's livelihood to foreign flag ships with substandard wages and conditions. In these circumstances the Supreme Court rejected the District Court's assumption of jurisdiction to issue an injunction on that court's stated ground that the picketing was an "unlawful interference with foreign commerce" and interfered "in

the internal economy of a vessel registered under the flag of a friendly foreign power". This position had been also adopted by the Court of Appeals, in reliance almost entirely on the holding in the *Benz case* (265 F. 2d 780, 786 (9th Cir. 1959)).

While the Supreme Court in *Marine Cooks* expressly bottomed its dismissal of the petition for an injunction on the limitations upon the courts' jurisdiction imposed by the Norris-LaGuardia Act, it gave expression to some [fol. 413] intriguing dictum. In a footnote (p. 371) the court pointed to the special facts present in the *Benz* situation (362 U. S. 365, at pp. 371-372, footnote 12):

> "Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. For a thoughtful discussion of the impact of foreign employment upon American labor standards, see *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 1959 Am. Mar. Cas. 326 (holding that the Norris-LaGuardia Act withdrew from Federal District Courts jurisdiction to issue labor injunctions in a labor dispute strikingly like the one here involved). But see *Fianza Cia. Nav. S. A.* v. *Benz*, 1959 Am. Mar. Cas. 1758, 37 CCH Lab. Cas. ¶65,495."

Therefore, in the *Benz* case, not only were there no substantial American contacts with the ship operated under the foreign flag of convenience, such as are present in this case; but the picketing by the unions was evidently viewed as prompted essentially out of sympathy for the objectives of foreign seamen on a foreign boat, and not to better the lot of American sailors. The three domestic [fol. 414] unions, by injecting themselves into this wholly

foreign dispute, placed themselves in the traditionally dangerous position of strangers intermeddling in a family fight.

It has been argued forcefully that the consideration of "international relations", "possibilities of international discord", etc., which so troubled the court in the *Benz* case when contemplating the applicability of the Labor Management Relations Act to foreign ships with foreign crews, are relevant with regard to the rights guaranteed to employees under §7 of the Act but are not relevant with regard to the prohibitions of §8 of the Act. (Comment "*The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing.*" 69 Yale L. J. 498, 516, 523.)

The National Labor Relations Board (NLRB) had in a somewhat similar situation refused to apply the protections of §7 of the Act while enforcing the prohibitions of §8. (Compare *In Re Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 N. L. R. B. 547 (1950), with *Compania Maritima Sansoc Limitada*, Case No. 20 RC-809 (5/1/50), CCH NLRB Decisions 1950-51, ¶10,081.) Only the dissenter in *Benz* accepted this argument (353 U.S. 138, 147-150). Cf. *I. B. of Teamsters* v. *N. Y., N. H. & Hartford R. R.*, 350 U. S. 155 (1956).)

Even at common law it was recognized that the deck of a visiting ship afforded no sanctuary from certain rights of local government; and that "all things done on board which affected only the vessel or those belonging to her, and *did not involve the peace or dignity of the country, or* [fol. 415] *the tranquility of the port*, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged. . . . " (*Wildenhus's Case*, 120 U. S. 1, 12 [1887]) (emphasis supplied).

The instant case would appear to rest somewhere between the situations posed in *Benz*, on the one hand, and *Marine Cooks*, on the other. Defendants here were picketing not only on behalf of the foreign employees of a foreign ship, as in *Benz*, but on their own behalf, as in *Marine Cooks*. And whatever might be plaintiff's status under international law, by all practical labor relations reckoning its

operations are as singularly domestic as though its ships sailed the Great Lakes.

If the *Benz* rule is applicable to all ships flying flags of convenience, it apparently has not been followed by the NLRB as devoutly as it should have been by the tribunal endowed with "exclusive primary competence" (*San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245) in these matters. In *Peninsular & Occidental Steamship Co.* (120 N.L.R.B. 1097 (1958)) the Board found jurisdiction and distinguished the *Benz* case where "the employer, as we have found above, is a domestic corporation, not a foreign national and the crews include a number of American citizens and resident aliens. Moreover the crews do not sign articles containing conditions of employment prescribed by a foreign government but rather sign old type American articles. As for the ships, their home port is, for all practical purposes at Miami, Florida. Further, though they are registered under foreign laws, they clearly do not operate under foreign laws, the crews, as noted, [fol. 416] signing American shipping articles and the only inspections of these ships being performed by agencies of the United States Government" (120 N.L.R.B. at pp. 1101-2, footnote 7).

In the most recent case the union, evidently unable to establish indirect American ownership of the ships flying flags of convenience, as in *Peninsular & Occidental*, urged instead that jurisdiction should be asserted by the NLRB regardless of the nationality of the owner of the vessel. The Regional Director dismissed the petition for an election, but the Board ordered the petition reinstated to resolve the substantial and material issues presented (*Eastern Shipping Corp. McCormack Shipping Corp. (S. I. U.)*, 12-RC 415 (9/21/59), CCH NLRB Decisions 1959-1960, ¶56,698).

Accordingly, the NLRB apparently does not consider the fact that the employer is a foreign entity operating a ship under the flag of a foreign country as an insurmountable barrier to the assertion of its jurisdiction in labor disputes. For all that appears the Board may take the view that its jurisdiction is proscribed by the *Benz* case only when some preexisting, previously confined shipboard dispute spills onto the dock, where an American union lends a

hand. (Cf. Comment Yale L. J., *op. cit. supra*, p. 521.) Short of that, the Board may take the position that while it will not afford relief under §7 because of possible conflict with settled rules of international law and principles of comity, it will enforce the prohibitions of §8 against an American union which engages in prohibited concerted activity directed against a foreign ship regularly doing [fol. 417] business in a United States port. It must be borne in mind that the Board may maintain jurisdiction if it has the statutory power either to protect or prohibit the activities in issue.

In such event, and at the very least, it can be argued strongly that this controversy involves rights and obligations exclusively within the primary jurisdiction of the National Labor Relations Board, to which under the Labor Management Relations Act both State and Federal courts must defer when conduct complained of in a labor dispute is either protected or proscribed by the Act. The basis and rationale of this policy are stated in *Garner* v. *Teamsters Union* (346 U. S. 485, 490, 491):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and especially constituted tribunal and described a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The [fol. 418] same reasoning which prohibits Federal Courts from intervening in such cases, except by way of review or on application of the Federal Board, pre-

cludes State Courts from doing so. Cf. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41; *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U. S. 261."

In *San Diego Building Trades Council* v. *Garmon* (359 U. S. 236, 244) the Supreme Court defined the boundaries of judicial action still more sharply, holding that when "an activity is arguably subject to §7 or §8 of the Act, the state as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (p. 245). The court stated:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this court's authority cannot remain within a State's power and State jurisdiction too must yield to the exclusive primary competence of the Board. . . ."

Chapter 7 of Title 29 of the U. S. Code will be searched in vain for language to support the contention that by statutory inhibition the jurisdiction given the NLRB by [fol. 419] the Labor Management Relations Act does not encompass labor disputes involving "foreign" ships. The term "commerce" includes "trade, traffic, commerce, transportation . . . among the several States . . . or between any foreign country and any State . . . or between points in the same State . . . but through . . . any foreign country" (§152(6)). The term "affecting commerce" includes "burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (§152(7)).

We are told that Congress created the NLRB to provide reasonable measures to prevent the disruption "of inter-

state and foreign commerce" (*Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 221-2 (1938)). That the dispute at issue in this case has disrupted "foreign commerce" is beyond argument. The decision in the *Benz* case, relying as it does exclusively on negative legislative history, must be confined rigorously to the fact situation presented by that case. Otherwise, the finding that the Labor Management Relations Act does not apply to "wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters" (353 U. S. at p. 142) would ignore the plain provisions of the Act. Throughout the *Benz* case the court carefully limits the scope of its decision by restrictive language such as "such dispute" and the "circumstances such as those posed here" (353 U. S. at pp. 142, 144).

Accordingly, neither the Act, the Board nor the federal courts have ever held that the plain terms of the Labor [fol. 420] Management Relations Act do not encompass "foreign" shipping. To the contrary, the Board and the courts have indicated that the Act may apply when a union of American workmen takes collective action against a foreign ship in the interest of preserving "the terms and conditions of their employment" by stabilizing "competitive wage rates and working conditions within and between industries" (29 U. S. C. A. §151). Cf. *Afran Transport Co.* v. *National Maritime Union, op. cit. supra; Eastern Shipping Corp. (S. I. U.), op. cit. supra.*

Accordingly, the order denying defendants' motion to dismiss the complaint for lack of jurisdiction should be reversed and the motion granted, and the judgment granting a permanent injunction should be reversed and the complaint dismissed, both reversals on the law and the facts.

STEVENS, J. concurs.

[fol. 421]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

INCRES STEAMSHIP COMPANY, LTD., Plaintiff-Respondent-Appellant,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL, Defendants-Appellants-Respondents,

and

EDWARD POGOR, JOHN DOE and RICHARD ROE, Defendants.

STIPULATION AS TO EXHIBITS—February 24, 1961

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the printing herein of the exhibits in evidence described below be dispensed with and the originals thereof shall be filed with this court upon the filing of defendants-appellants-respondents' brief, except for the exhibit which is noted as having been read into the record at the trial.

Plaintiff's Exhibits

3. Photograph of boat with marking U.M.D. 2.

4. Contract of Incres Steamship Company, Ltd.

[fol. 422] Defendants' Exhibits

D-D1 Picket signs (read into the record).

E. Constitution of International Maritime Workers Union.

Dated: New York, N. Y., February 24, 1961.

Donovan, Leisure, Newton & Irvine, Attorneys for Plaintiff-Respondent-Appellant.

Cooper, Ostrin & De Varco, Attorneys for Defendants-Appellants-Respondents.

[fol. 423]

STIPULATION WAIVING CERTIFICATION OF RECORD TO THE COURT OF APPEALS—February 24, 1961

It Is Hereby Stipulated and Agreed that the foregoing consists of a true and correct copy of the record on appeal to the Appellate Division, First Department, the notices of appeal to the Court of Appeals, the order of modification of the Appellate Division and the judgment entered thereon, appealed from, the majority opinion and the dissenting opinion of the Appellate Division, all of which are on file in the Office of the Clerk of the County of New York; and certification thereof, pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated: New York, New York, February 24, 1961.

Cooper, Ostrin & De Varco, Attorneys for Defendants-Appellants-Respondents.

Donovan, Leisure, Newton & Irvine, Attorneys for Plaintiff-Respondent-Appellant.

[fol. 423a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 424] Triple Certificate to foregoing paper (omitted in printing).

[fol. 425]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

INCRES STEAMSHIP COMPANY, LTD., Respondent-Appellant,

v.

INTERNATIONAL MARITIME WORKERS UNION et al., Appellants-Respondents, et al., Defendants.

OPINION—Decided July 7, 1961

Chief Judge DESMOND. Plaintiff Incres Steamship Company, Ltd., is a Liberian corporation owned by Italian stockholders. During seven months of each year it operates two Liberian-registered passenger ships, manned by alien crews signed on in Europe, on regularly scheduled cruises to Caribbean ports, originating at and returning to New York City. Its main office is in London and it has no place of business in Liberia but it has in New York City an office which it shares with a New York corporation (Incres Line Agency, Inc.) owned and controlled by Incres. The New York office is run by its manager who is president of Incres and the New York corporation acts as agent for Incres in booking passengers for the cruises, arranging schedules, and providing supplies, repairs and the like.

Defendant International Maritime Workers Union (IMWU) is an American labor union formed in 1959 by two other American maritime unions, both affiliated with AFL-CIO, to organize and improve job conditions of merchant seamen employed on "flag-of-convenience" ships, that is, ships registered in foreign countries (principally in Liberia, Panama and Honduras) but whose beneficial owners are not otherwise connected with the nations whose flags they use. As the United States Supreme Court observed in *Lauritzen* v. *Larsen* (345 U. S. 571, 587): "It is common knowledge that in recent years a practice has grown, especially among American shipowners, to avoid [fol. 426] stringent shipping laws by seeking foreign regis-

tration eagerly offered by some countries." American seamen's wages are several times as high as those paid by Incres. Beginning in February, 1960 representatives of IMWU began a campaign to organize plaintiff's seamen, going aboard the two vessels when docked in New York City and talking to the crew members. There were fruitless negotiations between Incres and the union. On May 13, 1960 the Incres cruise ship *Nassau* arriving at New York was met by IMWU representatives who, picketing peacefully, carried signs charging unfairness of Incres in refusing recognition to the union and demanding better wages and working conditions for the seamen. Later that day the IMWU pickets persuaded about 100 members of the *Nassau's* crew to leave the ship shortly before her scheduled departure and refuse to obey her captain's orders to return, resulting in a cancellation of the sailing. Two days later when the other Incres cruise ship *Victoria* came into New York harbor she could not dock because the strike-bound *Nassau* occupied the berth. The *Victoria* lay at anchor. While her passengers were being brought ashore on tugs, IMWU representatives arrived in a launch, boarded the tugs and at least for a time persuaded the tug crews to stop disembarking the *Victoria's* passengers. As a result of the picketing and striking, several cruises were cancelled. The union filed with the National Labor Relations Board (NLRB) charges of unfair labor practices which are still pending. Incres began this action in Supreme Court, New York County, and obtained first a temporary, then after trial a permanent, injunction enjoining the union from picketing plaintiff's vessels or urging or encouraging crew members not to work on the vessels. From the beginning the respective parties have taken the same two opposing positions as to which the Appellate Division divided 3 to 2 and which are again urged on us on this appeal. Incres argues, and both courts below held, that defendant's acts were illegal and tortious, and that the New York Supreme Court, not the National Labor Relations Board, had jurisdiction and power to restrain them. The union—and the two dissenting Justices at the Appellate Division—insists that the NLRB has under *San Diego Unions* v. *Garmon* (359 U. S. 236; see *Dooley* v. *Anton*, 8 N Y 2d 91)

exclusive primary jurisdiction since the conduct complained of is at least "arguably" or "potentially" subject to Federal regulation as protected activity or prohibited unfair labor practice under the Labor Management Relations Act (U. S. Code, tit. 29, § 141 *et seq.*). The only real question for us is whether the NLRB or the New York courts have jurisdiction of this controversy or, putting it more accurately, whether there is such doubt as to the applicability of the Federal statute that under the *San Diego Unions* v. *Garmon* "arguably subject" rule (359 U. S. 236, 245, *supra*) the State courts must yield to "the exclusive primary competence" of the NLRB.

[fol. 427] The union, besides asserting the exclusive jurisdiction of the NLRB, argues that its conduct was not unlawful, that the New York courts have no power to enjoin a "maritime tort" and that, in any event, injunctive relief from a New York court is precluded by the "labor dispute" provisions of section 876-a of the Civil Practice Act. We will assume, as did the Appellate Division, that the union is wrong as to all those positions, and go to the real question—jurisdiction. (This court has jurisdiction of the appeal because the Appellate Division made a slight modification of the permanent injunction by changing the language which prohibited picketing the vessels "for any purpose" so as to read for "any such purpose"—that is, a limitation to the particular activity condemned.)

The whole issue may be stated thus: is this dispute "arguably subject" to NLRB jurisdiction or, on the contrary, has it been authoritatively determined that the Labor Management Relations Act is completely inapplicable to labor disputes between nationals of other countries operating ships under foreign flags? The Supreme Court has not definitively made answer to that, but recent judicial and NLRB history, some of it made since the Appellate Division decision here, leaves it disputable that the NLRB has primary jurisdiction. The NLRB has taken jurisdiction of several representation cases as to foreign flag vessels (*Peninsular & Occidental S. S. Co.*, 42 LRRM 1113 [1958], *Eastern Shipping Corp.*, 44 LRRM 1571 [1959], and *West India Fruit & S. S. Co.*, 47 LRRM 1269, [1961]) and in *Navios Corp.* v. *National Mar. Union* (402 Pa. 325 [1960])

the United States Supreme Court (366 U. S. 905 [1961]) denied certiorari as to a Pennsylvania Supreme Court decision which had upheld dismissal of a State court suit on the ground of exclusive NLRB jurisdiction. Both the NLRB holding in the *West India* case and the denial of certiorari in *Navios* came after the Appellate Division's determination of the present case. In retaining jurisdiction in *West India Fruit & S. S. Co.*, the National Labor Relations Board wrote most comprehensively, reviewing practically every aspect of this question. We shall discuss that holding later on in this opinion but we say now that it clearly refutes the allegation in paragraph 17 of the complaint in the present action that the Federal labor relations statute does not "apply to foreign ships with foreign crews in any way".

Incres cites *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138) and *Marine Cooks* v. *Panama S. S. Co.* (362 U. S. 365) as final authority that the Federal act has no coverage of internal labor relations between a foreign ship and its foreign workers. The union answers correctly that the *Benz* case as explained in the *Marine Cooks Union* opinion related only to a ship which "happened temporarily to be in American waters" (see 362 U. S., p. 369). *Benz* [fol. 428] marked the point of division in the Appellate Division. However, the emphasis in *Benz* on the transient character of the American contacts of the ship there involved makes it impossible to regard the *Benz* holding, as the Appellate Division majority did, as a determination that "Congress did not intend to apply the Federal statute at all to foreign shipping." Left open by the *Benz* case was the question of what shipping is so "foreign" as to be excluded. All agree that foreign registration is not enough (see *Afran Transp. Co.* v. *National Mar. Union*, 169 F. Supp. 416, cited by the Supreme Court in the *Marine Cooks Union* opinion, 362 U. S. 365, 371, *supra*). All agree that Congress has power to intrude on the internal economy of a foreign-registered ship as a condition to permitting entry into American ports or waters (see *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 144-145, 147, *supra*). The unresolved question is as to whether Congress intended its

statute to apply to labor relations on a ship which while foreign-registered, foreign-crewed and foreign-owned has an American port as one of the two termini of its fixed, regular shuttle service, conducts an important part of its business from a New York City office and has no office at all in Liberia, the country whose flag its vessels fly. Is it possible to argue that those American "contacts" are sufficient for NLRB jurisdiction? The Federal Supreme Court, whatever answer it may finally give as to that, has already told us in the *Garner* v. *Teamsters Union* (346 U. S. 485, 490) and *San Diego Unions* v. *Garmon* (359 U. S. 236, 244, *supra*) cases that the State courts are "not primary tribunals to adjudicate such issues"; that these determinations must "be left in the first instance to the National Labor Relations Board" and, where conduct complained of is "arguably" or "potentially" subject to regulation and the Federal act, "States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" to avert "state interference with national policy". Under the board's *West India Fruit & S. S. Co.* decision (47 LRRM 1269, *supra*) it is, we think, certainly uncertain whether the board could validly or would take jurisdiction of this controversy. Indeed, a complaint by the union against alleged unfair labor practices by Incres has been pending before the board for a year without any decision as to jurisdiction or merits.

The ship in the *West India Fruit & S. S. Co.* case (47 LRRM 1269, *supra*) was the freighter *Sea Level* flying the Liberian flag and owned by a Liberian corporation but operating as a common carrier between Louisiana and Cuba, and with a Cuban crew. Clearly, held the board, she was engaged in "commerce" under the Federal act, the alleged unfair labor practices "affected" commerce under the act and nothing in the act exempts the maritime industry or seafarers. The "ship-territory" doctrine, said the board, has nothing to do with the territorial reach of the [fol. 429] statute (*Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 123) and so there is no "extraterritoriality" to interfere with applying the Federal statute to a foreign ship in American waters. The board concluded that there was

nothing to prevent Congress applying this law to events occurring on foreign-registered ships in domestic waters.

The question, said the board, was whether Congress, empowered as it is to regulate such ships while engaged in our foreign commerce, has by this act chosen to do so. The answer, it said, cannot be all inclusive but must under Supreme Court rulings be found by ascertaining and valuing the contacts between the transactions and the governments whose laws are in competition and by weighing the significance of one or more of those contacts (see *Lauritzen* v. *Larsen*, 345 U. S. 571, 578, *supra*, and *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, *supra*). To warrant application of American law, held the board, not all significant contacts need be American. Neither the "flag law" nor American ownership nor the nonresident status of the crew nor the "internal order doctrine" nor any applicable treaty is necessarily decisive, one way or the other. The board noted that the controversy was between an American union and an American employer, since the owner corporation and its stockholders were American. But the result reached by the board did not necessarily turn on those latter circumstances. The American contacts, held the board, were that the "dispute arose aboard a vessel which engaged exclusively in American foreign commerce, which operates regularly out of an American port, and which is drydocked and regularly provisioned in the United States." The foreign contacts, it said, were "the registry of the vessel and the nationality of the crew which works under foreign articles signed, however, in the United States." The *Benz* case (*supra*), so the board thought, meant no more than that "the Labor Act does not extend to a foreign flag vessel, its foreign owner and foreign crew absent substantial American commerce". While the board's decision mentions the American nationality of the stockholders of the foreign corporation operating the *Sea Level*, no particular point is made of that "contact" and there is no indication that the result would have been different had the stockholders been nationals of other countries. If the board had meant that domestic incorporation or domestic stock ownership was the essential thing, it could have said so. In

Eastern Shipping Corp. (44 LRRM 1571 [1959], *supra*) beneficial ownership of the foreign corporation was shown to be 95% foreign, but the board in a nonfinal decision overruled its Regional Director who had dismissed a representation proceeding because it involved labor relations on a "foreign" ship.

[fol. 430] All the other arguments against NLRB jurisdiction as put forth by Ingres here, including the "national policy" argument, were rejected in the board's opinion in the *West India Fruit & S. S. Co.* proceeding (47 LRRM 1269, *supra*). It is surely "arguable" that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should, therefore, hold as we did in *Dooley* v. *Anton* (8 N Y 2d 91, *supra*) that at least until the board refuses jurisdiction the State courts have none.

The judgment should be reversed and the complaint dismissed, with costs to defendants-appellants-respondents in all courts.

Fuld, J. (dissenting). The plaintiff, Ingres Steamship Company, Ltd., owns and operates two ocean-going liners generally engaged in the passenger cruise trade between New York City and Caribbean ports. In the spring of 1960, the defendant Maritime Workers Union organized, picketed and struck those vessels, disrupting their operations. The plaintiff thereupon instituted this action for injunctive relief and damages. The court at Special Term, denying a motion made by the defendants to dismiss the suit for lack of jurisdiction, granted the plaintiff the broad injunction which it had sought. The Appellate Division, though it agreed with all that the trial court had decided, modified the resulting judgment so as to limit the injunction "to the condemned [illegal] activity * * * presented in this case". Both plaintiff and the defendants appeal to us as of right.

We are called upon to construe the National Labor Relations Act, for the jurisdiction of the courts over the subject matter of this action depends upon whether the National Labor Relations Board has jurisdiction under that statute. If the Board has such jurisdiction, then, the courts have no authority to act. More specifically, the question

presented for decision is whether the Act applies to a controversy affecting a foreign (Liberian) flagship—engaged in foreign commerce bringing it to and from United States ports for short stays—which is 100% owned and controlled by foreign nationals and manned by a foreign crew, recruited and hired in the ship's home port in Italy and serving under foreign articles entered abroad.

In our view, the answer is clearly in the negative. Indeed, as Justice BREITEL observed in his comprehensive opinion for the Appellate Division, such a conclusion finds strong support in recent decisions of the Supreme Court. (See *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138; *Marine Cooks* v. *Panama S. S. Co.*, 362 U.S. 365; see, also, *Lauritzen* v. *Larsen*, 345 U. S. 571.) "Our study of the Act", wrote the court in the *Benz* case, "leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the [fol. 431] Act is concerned with industrial strife between American employers and employees" (353 U. S. at pp. 143-144).

The circumstance that there was here substantial continuing American foreign commerce and that the plaintiff had a New York corporation to act as its American agent is not sufficient to render inapplicable the rationale underlying the *Benz* decision and vest the National Labor Relations Board with jurisdiction. All-important in the case before us is the fact that the vessels were owned and controlled by Italian nationals and that their home port was, for all essential purposes, in Genoa; in addition, it might be noted, their crews, entirely alien, consisted largely of Italians who had signed on in Italy under contracts made abroad. In our judgment, if the National Labor Relations Act were to be held to cover the foreign-owned ships here involved simply because they dock in New York City and employ a New York corporation as their American agent, it would follow that the Act applies to give the board jurisdiction over controversies involving seamen on board the great fleets of foreign flag and foreign-owned passenger and cargo vessels while engaged in trips between the Port of New York and the foreign countries.

It is hardly necessary to observe that in terms of comity between nations such a result could not help but have a disastrous effect. When in the *Benz* case the argument was advanced as to the Act's applicability to foreign-owned ships, the Supreme Court expressed its concern in these words: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts" (353 U. S., at p. 147). Indeed, in *Lauritzen* v. *Larsen* (345 U. S. 571, *supra*), the court had earlier remarked that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction" (p. 582).

We will not impute to Congress—unless the intention is clearly expressed (cf. *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285-286)—a concern to deal with the labor relations of alien seamen on foreign flag vessels, owned by foreign nationals, throughout the world or even while they are in American waters. The fact that our American laws apply to crews, [fol. 432] no matter what their nationality, employed on American-owned vessels does not militate against our conclusion. It is the proper concern of Congress in passing labor laws to regulate and control conditions on American ships while they are in American waters, as well as while they are on the high seas and in foreign ports.

A completely different case is presented where the ship, flying a foreign flag of convenience, is actually owned and controlled by American nationals. In such a case—and this is the sort of case which is relied upon to support the argument and the conclusion that the National Labor Relations Act has given the board jurisdiction (see, e.g., *West India Fruit & S. S. Co.*, 130 NLRB No. 46, 47 LRRM 1269;

Peninsular & Occidental S. S. Co., 120 NLRB 1097, 42 LRRM 1113; *Navios Corp.* v. *National Mar. Union*, 402 Pa. 325, cert. den. 366 U.S. 905)—the ship may, in a very real sense, be regarded as sufficiently "American" to justify the invocation of the Federal statute.[1]

It has been urged that, even though it may ultimately be decided that the National Labor Relations Act does not apply to cover the controversy here involved, the pre-emption principles enunciated by the Supreme Court require that this matter be initially presented to the National Labor Relations Board. (See, e.g., *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245; *Dooley* v. *Anton*, 8 N Y 2d 91.) This is clearly not a *Garmon* or a *Dooley* type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity, under the Act. If there is "arguability" here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. In other words, as we have already stated, the question here is whether the Act applies at all to a strike or controversy arising out of the organization of the crew of a foreign flag vessel, owned and controlled by foreign nationals and manned by a foreign crew recruited abroad and serving under foreign articles executed abroad. [fol. 433] In point of fact, in the *Benz* case (353 U. S. 138, *supra*), the Supreme Court actually passed upon the issue whether the Act applied to the foreign flagship there involved. Such a determination could not have been made if the pre-emption doctrine were applicable, since that

[1] There can be no doubt that in the cases cited the operative fact was ownership by American nationals. Thus, in the *West India* case (130 NLRB No. 46), not only does the board's prevailing opinion remark and stress again and again the vessel's American ownership (e.g., pp. 3, 15, 24, 25, 27, 32), but the dissenting opinion in so many words notes that the majority "have determined that, pursuant to Section 2 (6) and (7), the jurisdictional reach of the Act extends to the operations of American shipowners who register their vessels with, and fly the flags of, foreign nations, and that the policies of the Act will be effectuated by asserting jurisdiction over these shipowners and their operations" (p. 43).

doctrine precludes federal courts—including the Supreme Court—as well as state courts, from taking jurisdiction over activities which arguably involve an unfair labor practice or protected conduct. (*See San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245, *supra*; *Plumbers' Union* v. *Door County*, 359 U. S. 354.) But courts, neither state nor federal, need step aside to permit the National Labor Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern.

In sum, therefore, it is our opinion that the National Labor Relations Act does not apply to a foreign flagship owned by foreign nationals, that the board does not have jurisdiction and that such a determination may in the first instance be made by a state court.

As to the further contention advanced by the defendants that section 876-a of the Civil Practice Act bars issuance of an injunction in this case, it is necessary merely to say that, since, as found by the courts below, the defendants' conduct was for an illegal purpose and the means employed by them to accomplish that purpose unlawful (see, e.g., *Southern S. S. Co.* v. *Labor Bd.*, 316 U. S. 31, 38 *et seq.*; *Simpson* v. *Hamburg-Amer. Line*, 1939 A. M. C. 1469, 1480), the injunction issued by Special Term, as modified by the Appellate Division, may not be successfully attacked as impermissible. (See, e.g., *Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300, 305-306; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101.)

We would affirm the judgment appealed from.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Fuld dissents in an opinion in which Judge Burke concurs and in which Judge Van Voorhis concurs in the following memorandum: I concur in the dissenting opinion by Judge Fuld except that I do not reach the question whether the same result would obtain in case of vessels of foreign registry but domestic ownership.

Judgment reversed, etc.

[fol. 434]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND, Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

Remittitur July 7, 1961.

[fol. 435]

INCRES STEAMSHIP COMPANY, LTD., Respondent-Appellant,

vs.

INTERNATIONAL MARITIME WORKERS UNION & ANO.,
Appellants-Respondents,

and

EDWARD POGOR, & ORS., Defendants.

REMITTITUR—July 7, 1961

Be it Remembered, That on the 11th day of April in the year of our Lord one thousand nine hundred and sixty-one, International Maritime Workers Union & ano., the appellants-respondents in this cause, came here unto the Court of Appeals, by Cooper, Ostrin & De Varco, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Incres Steamship Company, Ltd., the respondent-appellant in said cause, afterwards appeared

in said Court of Appeals by Donovan, Leisure, Newton & Irvine, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 436] Whereupon, The said Court of Appeals having heard this cause argued by Mr. H. Howard Ostrin, of counsel for the appellants-respondents, and by Mr. Breck P. McAllister, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the complaint dismissed, with costs to the defendants-appellants-respondents in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 437] Wherefore, it is considered that the said judgment be reversed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper (omitted in printing)

[fol. 438]

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse in the City of New York on the 7th day of August, 1961.

Present: Hon. Birdie Amsterdam, Justice.

7187/1960

Incres Steamship Company, Ltd., Plaintiff,

—against—

International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, Defendants.

Order Making Judgment of Court of Appeals the Judgment of Supreme Court—August 7, 1961

The above-mentioned defendants-appellants-respondents having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on August 4, 1960 in the office of the Clerk of New York County, and the above-mentioned plaintiff-respondent-appellant having appealed to the Court of Appeals from a part of said judgment, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be reversed and the complaint dismissed and judgment entered for the defendants-appellants-respondents with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County.

Now, on motion of Cooper, Ostrin & De Varco, attorneys for defendants-appellants-respondents,

It is Ordered that the said judgment of the Court of Appeals be, and the same hereby is, made the judgment of [fol. 439] this Court; and that the judgment entered herein on August 4, 1960 be, and the same hereby is, re-

versed, and that a judgment of this Court be entered herein reversing said judgment with costs in all courts to the defendants-appellants-respondents.

Enter

Birdie Amsterdam, J.S.C.

Filed Aug. 8, 1961, New York County Clerk's Office.

[fol. 440]

In Supreme Court of the State of New York

County of New York

Incres Steamship Company, Ltd., Plaintiff,

—against—

International Maritime Workers Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe, Defendants.

Judgment—August 18, 1961

The above-named defendants having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, First Department, entered in this action on August 4, 1960, affirming and modifying in part the judgment in favor of the plaintiff against the defendants heretofore entered herein in the office of the Clerk of New York County on June 10, 1960; and the above-mentioned plaintiff having appealed to the Court of Appeals from said modification of said judgment, and the Court of Appeals having heard said appeals; and ordered that the judgment so appealed from be reversed and the complaint dismissed with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County and the order having been entered thereon making the order and judgment of said Court of Appeals the order and judgment of this Court;

Now, on motion of Cooper, Ostrin & De Varco, attorneys for the defendants herein, it is hereby

Adjudged that the said judgment entered herein on August 4, 1960 be and the same hereby is reversed and the complaint dismissed; and it is hereby

[fol. 441] Adjudged that the defendants recover of the plaintiff the sum of $2,585.84 costs as taxed, and that the defendants have execution therefor.

Dated: New York, N. Y., August 18, 1961.

James McGurrin, Clerk.

[fol. 442]

SUPREME COURT OF THE UNITED STATES

No. 469—October Term, 1961

INCRES STEAMSHIP COMPANY, LTD., Petitioner,

vs.

INTERNATIONAL MARITIME WORKERS UNION, et al.

ORDER ALLOWING CERTIORARI—December 4, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is set for argument immediately following No. 166.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

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crew under foreign articles entered into abroad while the ship happens temporarily to be in American waters. As this Court said: "The whole background of the Act is concerned with industrial strife between American employers and employees." (*id.* at 143-44) 11

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Dissenting Opinion C9

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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled case on July 7, 1961 and the order and judgment entered on the remittitur of the Court of Appeals in the Supreme Court of the State of New York, New York County.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals of the State of New York dated and filed July 7, 1961, reprinted as Appendix C, *infra*, are reported at 10

N. Y. 2d 218. The majority and minority opinions in the Appellate Division of the Supreme Court of the State of New York, First Department, dated and filed July 6, 1960, reprinted as Appendix D, *infra*, are reported at 11 App. Div. 2d 177, 202 N. Y. S. 2d 692. The oral decision *per* Justice Greenberg, in the Supreme Court of the State of New York, New York County granting a permanent injunction, dated and filed May 25, 1960, has not yet been officially reported and is reprinted as Appendix E, *infra*. The oral decision *per* Justice Greenberg denying defendants' cross motion to dismiss the complaint, dated and filed May 19, 1960, has not yet been officially reported and is reprinted as Appendix F, *infra*.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was dated and entered on July 7, 1961. The jurisdiction of this court is invoked under 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

1. Whether the state court erred in applying the rule enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that "when an activity is arguably subject to §7 or §8 of the Act [The Labor Management Relations Act, as amended] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." (*id.* at 245), where the issue here is a question of law, on facts not in dispute, as to whether the Act applies at all to foreign owned, foreign

registered vessels flying foreign flags, manned by foreign crews serving under foreign articles entered abroad, the ships having come temporarily into American waters?

2. Whether the reach of the Labor Management Relations Act, as amended, extends to foreign owned, foreign registered ships flying foreign flags and their foreign seamen working under foreign seamen's articles entered abroad, the ships having temporarily come into American waters; and whether the Act thus deprives state courts of jurisdiction over an action in tort seeking injunctive relief and damages against an American seamen's union from picketing or urging or inducing crew members to desert and to refuse to perform their duties in violation of their seamen's articles and the orders of the Master?

STATUTE AND TREATY INVOLVED

Petitioner contends that the jurisdictional scope of the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§141-187, does not extend to the foreign ships here involved. The answer to this question cannot be resolved by reference to any particular section of the Act, which literally construed extends over all countries and all peoples. To illustrate this §141 and §152 (2), (3), (6) and (9) are reprinted in Appendix G, *infra*, pp. G1-G3.

Reprinted in Appendix G, *infra*, p. G1, are Articles VII, and XV of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, Aug. 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

STATEMENT OF THE CASE

The Parties

Petitioner (plaintiff below), Ineres Steamship Company, Ltd. (hereinafter called "Ineres"), is a Liberian corporation (Par. 1 of Complaint, R. 10; Exhs. 1 and 2, R. 361, 363; R. 88, 91, 93-94, 104), owned by Italian nationals residing in Italy, with its principal office in London (R. 105). Ineres owns the ocean going passenger cruise vessels, SS NASSAU and MV VICTORIA (Exhs. 1 and 2, R. 361, 363; R. 89, 104).

Respondent (defendant below) the International Maritime Workers Union (hereinafter called "IMWU") is an American labor organization (Par. 12 of the Amended Answer, R. 44; R. 297) formed in November, 1959 (R. 284) by two American maritime unions—National Maritime Union and Seafarers International Union (R. 285)—for the "stated objectives" of organizing and representing alien seamen working on foreign flag vessels (Exh. E [not printed in Record]). Respondent and defendant below Shannon J. Wall is both principal officer of IMWU and an officer of the National Maritime Union (R. 284-285). None of the other defendants was served, nor did any make an appearance.

The Foreign Vessels and Crews

Both vessels are registered under the laws of Liberia and fly the Liberian flag (Par. 6 of Complaint, R. 11; Exhs. 1 and 2, R. 361, 363; R. 88-89, 91-92, 100, 118). The vessels are at present engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of Complaint, R. 11; R. 119). How-

ever, not all cruises originate in a United States port (R. 194), and cruises are made each year to European ports (R. 95, 194) including Genoa, Italy (R. 119) where the vessels undergo repairs and the crew takes its leave (R. 122). The *de facto* home port of the vessels is Genoa, Italy (Opinion of App. Div., R. 402). The crews of the vessels are non-resident aliens, almost all of whom are Italian (Par. 8 of Complaint, R. 11-12; R. 114-115, 178, 178). They are recruited and hired in Genoa (R. 110, 178) under a wage agreement for the duration of the voyage and the season (R. 110). They sign Liberian articles in Genoa (R. 192) in the presence of a Liberian consul (Exh. C, R. 369; R. 192, 267). The articles provide *inter alia* that "the terms of employment of the Master and the rest of the crew are governed by the laws of the Republic of Liberia . . ." and also that crew members ". . . shall be ready to sail for any voyage and any destination whatsoever, at any time, whenever they shall receive orders to such effect from the Master of the ship or whomsoever replaces him" (Exh. C, R. 369). The articles incorporate by reference a more detailed underlying contract governing wages, terms and conditions of employment (Exh. 4 [not printed in the Record]; R. 110, 234, 267). Provisions in this contract obligate each crew member, *inter alia*, to obey the orders of his superior, to return to the ship not later than two hours before sailing and to give notice of intention to terminate his employment at least 48 hours before arrival or departure of the vessel in port (R. 268-270).

Union Activities

In February 1960 IMWU initiated a campaign to organize crew members on the NASSAU and VICTORIA (R. 299).

On May 13, 1960, shortly after docking at pier 42, North River, New York City, the NASSAU—scheduled to depart on another cruise that same day—was met by an IMWU picket line (R. 218, 219, 237; Exhs. D and D-1 [not printed in record]). As a result of this picketing, longshoremen refused to load baggage, cargo and provisions on the NASSAU (Par. 12 of Complaint, R. 13; Wolfson Affid., R. 21; R. 219, 240, 241). Moreover, some crew members on the NASSAU, at the instigation of IMWU representatives on the dock, thereupon refused to obey orders to perform certain duties (Vagliasindi Affid., R. 24, 25; R. 218, 220, 257).

Later that same day, IMWU representatives from positions on the dock and on board the vessel caused about 100 crew members, without permission and in disobedience of their seamen's articles, to walk off the NASSAU approximately one hour before the vessel's scheduled departure (Pars. 11 and 13 of Complaint, R. 12-13; Wolfson Affid. R. 21; R. 219). These crew members refused to obey the order of the Captain that they return to the ship (Vagliasindi Affid., R. 25; R. 222-223). The NASSAU was left helpless and immobile at its berth, making it necessary to cancel the scheduled voyage (Pars. 15 and 22 of Complaint, R. 14, 16; Wolfson Affid., R. 21-22; Vagliasindi Affid., R. 26; R. 224-225, 250).

Two days later, on May 15, the IMWU took direct action against petitioner's other vessel, the VICTORIA, returning from a cruise to South America (R. 164-165). That day, pier 42, where the VICTORIA had been scheduled to dock (R. 164, 252), was occupied by the NASSAU, then still unable to sail (R. 252). Since other docking facilities could not

be obtained for the VICTORIA (R. 252-253), it was necessary to disembark its passengers by tug boats while the vessel lay at anchor in New York Harbor (R. 164). As passengers were being brought ashore, IMWU representatives in a small launch marked "UMD-2" approached and boarded the tug boats (R. 165-166). Immediately thereafter the tug boats ceased disembarking passengers and left the vicinity of the vessel (R. 166, 179). Later that same day, following the intervention of police officials, the tug boats resumed operations (R. 166).

The next day, May 16, the IMWU was served with a temporary restraining order which enjoined the union from picketing plaintiff's vessels or urging or encouraging crew members not to work on those vessels (R. 8-9). On the following day, May 17, early in the afternoon, passengers were being embarked by means of launches on the VICTORIA, which remained at anchor (R. 167). The vessel, scheduled to sail later that day (R. 167), was again approached by the launch UMD-2 (R. 139). Then, despite the restraining order, as the UMD-2 hovered near the vessel, IMWU representatives on board the launch urged the crew with a loudspeaker (R. 139, 212) not to sail (R. 139-141, 156, 160, 167-168, 180-181). This activity continued for approximately 40 minutes (R. 212).

A few hours later, when all of the passengers were on board and the VICTORIA was ready to sail as scheduled (R. 169), the members of the engine room department refused to run the engines (R. 158-159, 169, 173-174, 197, 201, 203). Representatives of the crew informed the Captain that they wished to confer with "the Union" (R. 174, 201). Because of this refusal the ship could not sail (R. 169, 203).

On the following day, the Captain of the VICTORIA permitted representatives of the crew to go ashore and meet with IMWU representatives (R. 174-175). Following this meeting, the crew members on shore contacted by radio telephone crew members remaining on the vessel and confirmed that the VICTORIA was not to sail (R. 176-177, 202-203). Thereupon the cruise was canceled, passengers disembarked and passage monies refunded (R. 177-178).

As a result of the picketing and other acts of interference by the IMWU, neither the NASSAU nor the VICTORIA was able to resume its normal operations until after the decision of the Supreme Court of New York (R. 374-382) granting the permanent injunction against picketing and other acts of interference.

Incres Line Agency, Inc. and Cosmopolitan Shipping Corporation

Incres has engaged the services of Incres Line Agency, Inc., a New York corporation with offices at 39 Broadway, as an agent to take care of the booking and arrival and departure arrangements of passengers in the United States (R. 106, 109). Incres Line Agency, Inc. accounts to Incres for the sale of passenger tickets (R. 111) and takes care of the provisioning of the ships when necessary in the United States (R. 109). Wolfson, president of the agency, may authorize repairs either after discussion with the president of Incres or occasionally with someone else (R. 111). The president of Incres, Vincenzo Berlingeri, an Italian citizen (R. 104), is also an unpaid officer and director of Incres Line Agency, Inc. (R. 113) and is provided office space at 39 Broadway when he stays in New York (R. 105).

Cosmopolitan Shipping Corporation with offices at 42 Broadway, New York City (R. 115) acts as ships' husband when the ships come into New York (R. 251), takes care of fueling (R. 112), loading, docking and disembarkation of passengers and hires linesmen, tugboats, and pilots (R. 251, 253). Cosmopolitan provides these services for other steamship lines as well as Ineres (R. 251).

The Litigation

Ineres commenced the present tort action for damages and injunctive relief in the Supreme Court of the State of New York, New York County, on May 16, 1960, by service on that date of a summons and complaint, a temporary restraining order and an order to show cause why a permanent injunction against defendants' activities should not issue, signed by Justice Greenberg. A hearing pursuant to said order to show cause commenced May 18, 1960.[1] The hearing continued over a four day period. The order and judgment of the Supreme Court of New York (Greenberg, J.) denied defendants' motion to dismiss the complaint, permanently enjoined defendants, and severed plaintiff's damage claim for trial in regular course. Defendants appealed to the Appellate Division, First Department, which by a three to two decision modified and affirmed the order and judgment below. Defendants appealed, and by a four to three decision the Court of Appeals reversed the order and judgment of the Appellate Division and dismissed the complaint.

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[1] During the course of the hearing counsel for the parties stipulated that the hearing be treated as a hearing for a permanent injunction.

This petition is for a writ addressed to the Supreme Court of the State of New York, New York County because under New York procedure the judgment and order dismissing the complaint was entered in that Court on remittitur from the Court of Appeals.

Stage in Proceedings and Manner in Which Federal Questions Were Raised

Defendants by cross motion to dismiss the complaint for lack of jurisdiction over the subject matter raised the federal questions of whether the Labor Management Relations Act, as amended, was intended to extend to the foreign ships involved in this case and whether it deprived the court of jurisdiction under the stated circumstances (R. 27). Defendants' amended answer in paragraph 31, by way of affirmative defense, alleged that the New York Court "lacks jurisdiction of the subject of the action and exclusive jurisdiction lies with the National Labor Relations Board" (R. 48). Defendants' second affirmative defense alleged that defendants' conduct ". . . was a lawful exercise of rights afforded by the Labor Management Relations Act, 1947" (R. 48).

The trial court denied defendants' cross motion to dismiss the complaint—noting an exception (opinion at R. 126-130; reprinted as Appendix F, *infra*). It then held that the Labor Management Relations Act did not deprive the court of jurisdiction in this case and that defendants' activities were unlawful and issued a permanent injunction—noting an exception (opinion at R. 374-382; reprinted as Appendix E, *infra*).

On appeal before both the Supreme Court, Appellate Division and the Court of Appeals the same federal questions were presented and decided.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Court of Appeals of the State of New York has decided important federal questions not in accord with the applicable decisions of this Court, in that:

1. The Court of Appeals erred in applying the pre-emption principle enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), to the instant case in which the question is whether the coverage of the Act extends at all to the foreign vessels here involved. If there is any "arguability" here, it is as to the very scope and reach of the Act itself, and the question is a pure question of law involving no special competence of the National Labor Relations Board; and

2. The Court of Appeals erred in not following the controlling decision in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act, as amended, does not extend to a foreign ship and its foreign crew under foreign articles entered into abroad while the ship happens temporarily to be in American waters. As this Court said: "The whole background of the Act is concerned with industrial strife between American employers and employees." (*id.* at 143-44)

The federal questions presented are of substance and should be settled by this Court. They involve the claim by American seamen's unions that federal labor law is applicable to protect their picketing and organizing activities in relation to the foreign employers and foreign seamen on board the great fleets of foreign vessels during their

short stays in the Port of New York and other ports of the United States while engaged constantly and continuously in international trade.

This Court made it clear in its opinion in the *Benz* case, *supra*, that if federal labor law is to be given any such application "the affirmative intention of the Congress" must be "clearly expressed" because:

> "It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." (353 U. S. at 147)

Argument

1. The Court of Appeals Erred in Applying the Preemption Principle of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), to the Instant Case.

The New York Court of Appeals, citing the rule of *San Diego Building Trades Council* v. *Garmon*, *supra*, held that where activity is "arguably subject" to the National Labor Relations Act, both state and federal courts must defer to the "exclusive competence of the National Labor Relations Board." The state court concluded that "it is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should therefore hold . . . that at least until the board refuses jurisdiction the State courts have none." (*id.* Appendix C, p. C8)

The rule stated in the *Garmon* case was that "when an activity is arguably subject to §7 or §8 of the Act the States

as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." (*id.* at 245) The question there was whether particular conduct of persons, who were obviously within the jurisdictional coverage of the Act, was either protected or prohibited under §7 or §8 of the Act. Here, on the contrary, no such question is presented. The question here is whether the Labor Act was intended to apply to foreign ships at all. On this question of law, the Board has no special competence or experience and the *Gaynon* case does not apply. The state court should have reached and decided the question of the scope of the Labor Act.

In *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), this court, in reviewing the decision of a federal court sitting in diversity, reached and decided the issue of whether the Act applied to the foreign vessel there involved. Such a determination could not have been made if the pre-emption doctrine were applicable. Only the opinion of the dissent in the *Benz* case concluded that the controversy fell within the exclusive primary competence of the Board.

There is here no dispute as to the facts essential to the jurisdictional question.

The underlying issue here involves construction as to the very reach of the Act, as in the *Benz* case, and this requires consideration of not only legislative intent, but international maritime law and principles of comity and the Treaty of Friendship, Commerce and Navigation between the United States and Liberia, Aug. 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

2. The Court of Appeals Erred in Not Following the Controlling Authority of *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957).

This Court in the *Benz* case held squarely that "the . . . Act . . . [does not apply] to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." (*id.* at 138-139)

In considering the basic question as to the Congressional intent regarding the scope of the Act, this Court in *Benz* stated its conclusion that:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. . . . What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possession." (353 U. S. at 143-44)

The facts in the present case fit squarely within the holding of the *Benz* case in every essential particular. In both the vessels were foreign registered and flew a foreign flag, were owned by foreign corporations and were manned with alien crews serving under foreign articles entered

abroad. In both cases there was direct interference by American seamen's unions with the internal management and affairs of the vessels. In both cases defendants acted while the vessels were temporarily in United States ports. In the case at bar Ineres is owned by Italian nationals residing in Italy.

The majority of the state court distinguished *Benz* on the ground that the instant case involved ships which provided a "regular shuttle service" in and out of a United States port (Appendix C, p. C6) whereas the ship in the *Benz* case "happened temporarily to be in American waters" (Appendix C, p. C5).

In thus distinguishing the authority of the *Benz* decision, the state court has, we submit, committed serious error of law which should be corrected.

A multitude of foreign vessels have, throughout our history as a great maritime nation, conducted a "regular shuttle service" of passenger and freight vessels across the North Atlantic and South Atlantic and other great trade routes. We submit that the import of the decision of this Court in the *Benz* case does not mean that federal labor law is applicable to foreign ships that regularly or frequently trade in United States ports. We further submit that the *Benz* case in holding that the Labor Act does not apply to a foreign vessel, is consistent with applicable treaty and international maritime law and principles of comity in relations with friendly foreign nations.

These foreign ships come into United States ports expecting and relying on the United States to respect the established principle under treaty and international law

and comity that a nation should refrain from asserting jurisdiction over and interfering with the internal economy, discipline and affairs of foreign vessels. This Court has long respected and applied this principle. See *Lauritzen* v. *Larsen*, 345 U. S. 571, 581, 582 (1953); *United States* v. *Flores*, 289 U. S. 137, 155-157 (1933); *Wildenhus's Case*, 120 U. S. 1, 12 (1887). If the rationale of the *Benz* case is not followed and the reach of the Labor Act is construed to extend to foreign ships, the warning of this Court in *Lauritzen* v. *Larsen*, *supra*, would be frustrated:

> " . . . in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." (*id.* at 582)

The National Labor Relations Board has this year rendered three decisions in which it has upheld its jurisdiction over foreign vessels—two decisions being reviewable and one unreviewable.

The two reviewable decisions are *West India Fruit & Steamship Co., Inc.*, 130 NLRB No. 46 (Feb. 16, 1961), in which the employer and owner of the foreign vessel was a Virginia corporation wholly owned by American stockholders and *Peninsular & Occidental S. S. Co.*, 132 NLRB No. 1 (July 10, 1961), in which, again, ultimate beneficial ownership was held by Americans. In its most recent decision in a non-reviewable representation case, *Eastern Shipping Corp.*, 132 NLRB No. 72 (Aug. 10, 1961), the foreign vessel was 95% foreign owned.

The question of law presented in the instant case is thus of importance in the administration of the Labor Management Relations Act, as amended, as well as in settling the jurisdiction of state courts. It is important that the coverage of the Act be settled on this important point, which affects so vitally the conduct of the foreign commerce of the world when it touches at United States ports.

CONCLUSION

For the foregoing reasons, we urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

GEORGE S. LEISURE,
BRECK P. MCALLISTER,
Counsel for Petitioner, Incres Steamship Company, Ltd.

ROBERT S. OGDEN, JR.,
DONOVAN LEISURE NEWTON & IRVINE,
of Counsel.

APPENDIX A

REMITTITUR TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

In the Court of Appeals of the State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, *Presiding.*

Raymond J. Cannon, *Clerk.*

Remittitur July 7, 1961

Incres Steamship Company, Ltd., *Respondent-Appellant,* *vs.* International Maritime Workers Union & ano., *Appellants-Respondents.* *and* Edward Pogor, & ors., *Defendants.*	New York County Clerk's Index No. 7187-1960.

Be it remembered, That on the 11th day of April in the year of our Lord one thousand nine hundred and sixty-one, International Maritime [sic] Workers Union & ano.,

the appellants-respondents in this cause, came here unto the Court of Appeals, by Cooper, Ostrin & De Varco, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Ineres Steamship Company, Ltd., the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Donovan Leisure Newton & Irvine, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed. [not printed]

Whereupon, The said Court of Appeals having heard this cause argued by Mr. H. Howard Ostrin, of counsel for the appellants-respondents, and by Mr. Breck P. McAllister, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the complaint dismissed, with costs to the defendants-appellants-respondents in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

[SEAL]

(of the State of New York
Court of Appeals)

APPENDIX B

Judgment and Order of the Supreme Court of the State of New York, County of New York.

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff,

against

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

JUDGMENT

The above-named defendants having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, First Department, entered in this action on August 4, 1960, affirming and modifying in part the judgment in favor of the plaintiff against the defendants heretofore entered herein in the office of the Clerk of New York County on June 10, 1960; and the above-mentioned plaintiff having appealed to the Court of Appeals from said modification of said judgment, and the Court of Appeals having heard said appeals; and ordered that the judgment so appealed from be reversed and the complaint dismissed with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County and the order having been entered thereon making the order and judgment of said Court of Appeals the order and judgment of this Court;

Now, on motion of COOPER, OSTRIN & DE VARCO, attorneys for the defendants herein, it is hereby

ADJUDGED that the said judgment entered herein on August 4, 1960 be and the same hereby is reversed and the complaint dismissed; and it is hereby

ADJUDGED that the defendants recover of the plaintiff the sum of $2,585.84 costs as taxed, and that the defendants have execution therefor.

Dated: New York, N. Y.
August 18, 1961.

JAMES McGURRIN
Clerk

Appendix B

7187/1960

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse in the City of New York on the 7th day of August, 1961

PRESENT:

HON. BIRDIE AMSTERDAM
Justice.

[SAME TITLE]

ORDER

The above-mentioned defendants-appellants-respondents having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on August 4, 1960 in the office of the Clerk of New York County, and the above-mentioned plaintiff-respondent-appellant having appealed to the Court of Appeals from a part of said judgment, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be reversed and the complaint dismissed and judgment entered for the defendants-appellants-respondents with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County,

Now, on motion of COOPER, OSTRIN & DE VARCO, attorneys for defendants-appellants-respondents,

IT IS ORDERED that the said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the judgment entered herein on August 4, 1960 be, and the same hereby is, reversed, and that a judgment of this Court be entered herein reversing said judgment with costs in all courts to the defendants-appellants-respondents.

ENTER

/s/ BIRDIE AMSTERDAM
J. S. C.

Filed Aug. 8, 1961

New York County Clerk's Office

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff-Respondent-Appellant,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL,

Defendants-Appellants-Respondents,

and

EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

Argued May 23, 1961; decided July 7, 1961.

DESMOND, *Chief Judge.*

Plaintiff Incres Steamship Company, Ltd., is a Liberian corporation owned by Italian stockholders. During seven months of each year it operates two Liberian-registered passenger ships, manned by alien crews signed on in Europe, on regularly scheduled cruises to Caribbean ports, originating at and returning to New York City. Its main office is in London and it has no place of business in Liberia but it has in New York City an office which it shares with a New York corporation (Incres Line Agency, Inc.) owned

and controlled by Incres. The New York office is run by its manager who is president of Incres and the New York corporation acts as agent for Incres in booking passengers for the cruises, arranging schedules, and providing supplies, repairs and the like.

Defendant International Maritime Workers Union (IMWU) is an American labor union formed in 1959 by two other American maritime unions, both affiliated with AFL-CIO, to organize and improve job conditions of merchant seamen employed on "flag-of-convenience" ships, that is, ships registered in foreign countries (principally in Liberia, Panama and Honduras) but whose beneficial owners are not otherwise connected with the nations whose flags they use. As the United States Supreme Court observed in *Lauritzen* v. *Larsen* (345 U. S. 571, 587): "It is common knowledge that in recent years a practice has grown, especially among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." American seamen's wages are several times as high as those paid by Incres. Beginning in February, 1960 representatives of IMWU began a campaign to organize plaintiff's seamen, going aboard the two vessels when docked in New York City and talking to the crew members. There were fruitless negotiations between Incres and the union. On May 13, 1960 the Incres cruise ship *Nassau* arriving at New York was met by IMWU representatives who, picketing peacefully, carried signs charging unfairness of Incres in refusing recognition to the union and demanding better wages and working conditions for the seamen. Later that day the IMWU pickets persuaded about 100 members of the *Nassau's* crew to leave the ship shortly before her scheduled departure and refuse to obey her captain's orders to return, resulting in a cancellation of the sailing. Two days later when the other Incres cruise

ship *Victoria* came into New York harbor she could not dock because the strike-bound *Nassau* occupied the berth. The *Victoria* lay at anchor. While her passengers were being brought ashore on tugs, IMWU representatives arrived in a launch, boarded the tugs and at least for a time persuaded the tug crews to stop disembarking the *Victoria's* passengers. As a result of the picketing and striking, several cruises were cancelled. The union filed with the National Labor Relations Board (NLRB) charges of unfair labor practices which are still pending. Incres began this action in Supreme Court, New York County, and obtained first a temporary, then after trial a permanent, injunction enjoining the union from picketing plaintiff's vessels or urging or encouraging crew members not to work on the vessels.

From the beginning the respective parties have taken the same two opposing positions as to which the Appellate Division divided 3 to 2 and which are again urged on us on this appeal. Incres argues, and both courts below held, that defendant's acts were illegal and tortious, and that the New York Supreme Court, not the National Labor Relations Board, had jurisdiction and power to restrain them. The union—and the two dissenting Justices at the Appellate Division—insist that the NLRB has under *San Diego Unions* v. *Garmon* (359 U. S. 236; see *Bodley* v. *Anton*, 8 N Y 2d 91) exclusive primary jurisdiction since the conduct complained of is at least "arguably" or "potentially" subject to Federal regulation as protected activity or prohibited unfair labor practice under the Labor Management Relations Act (U. S. Code, tit. 29, §141 *et seq.*). The only real question for us is whether the NLRB or the New York courts have jurisdiction of this controversy or, putting it more accurately, whether there is such doubt as to the applicability of the Federal statute that under the *San Diego Unions* v. *Garmon* "arguably subject" rule (359 U. S. 236,

245, *supra*) the State courts must yield to "the exclusive primary competence" of the NLRB.

The union, besides asserting the exclusive jurisdiction of the NLRB, argues that its conduct was not unlawful, that the New York courts have no power to enjoin a "maritime tort" and that, in any event, injunctive relief from a New York court is precluded by the "labor dispute" provisions of section 876-a of the Civil Practice Act. We will assume, as did the Appellate Division, that the union is wrong as to all those positions, and go to the real question —jurisdiction. (This court has jurisdiction of the appeal because the Appellate Division made a slight modification of the permanent injunction by changing the language which prohibited picketing the vessels "for any purpose" so as to read for "any such purpose"—that is, a limitation to the particular activity condemned.)

The whole issue may be stated thus: is this dispute "arguably subject" to NLRB jurisdiction or, on the contrary, has it been authoritatively determined that the Labor Management Relations Act is completely inapplicable to labor disputes between nationals of other countries operating ships under foreign flags? The Supreme Court has not definitively made answer to that, but recent judicial and NLRB history, some of it made since the Appellate Division decision here, leaves it disputable that the NLRB has primary jurisdiction. The NLRB has taken jurisdiction of several representation cases as to foreign flag vessels (*Peninsular & Occidental S. S. Co.*, 42 LRRM 1113 [1958]; *Eastern Shipping Corp.*, 44 LRRM 1571 [1959], and *West India Fruit & S. S. Co.*, 47 LRRM 1269 [1961]) and in *Navios Corp.* v. *National Mar. Union* (402 Pa. 325 [1960]) the United States Supreme Court (366 U. S. 905 [1961]) denied certiorari as to a Pennsylvania Supreme Court decision which had upheld dismissal of a State court suit on the

ground of exclusive NLRB jurisdiction. Both the NLRB holding in the *West India* case and the denial of certiorari in *Navios* came after the Appellate Division's determination of the present case. In retaining jurisdiction in *West India Fruit & S. S. Co.*, the National Labor Relations Board wrote most comprehensively, reviewing practically every aspect of this question. We shall discuss that holding later on in this opinion but we say now that it clearly refutes the allegation in paragraph 17 of the complaint in the present action that the Federal labor relations statute does not "apply to foreign ships with foreign crews in any way".

Ineres cites *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138) and *Marine Cooks* v. *Panama S. S. Co.* (362 U. S. 365) as final authority that the Federal act has no coverage of internal labor relations between a foreign ship and its foreign workers. The union answers correctly that the *Benz* case as explained in the *Marine Cooks Union* opinion related only to a ship which "happened temporarily to be in American waters" (see 362 U. S., p. 369). *Benz* marked the point of division in the Appellate Division. However, the emphasis in *Benz* on the transient character of the American contacts of the ship there involved makes it impossible to regard the *Benz* holding, as the Appellate Division majority did, as a determination that "Congress did not intend to apply the Federal statute at all to foreign shipping." Left open by the *Benz* case was the question of what shipping is so "foreign" as to be excluded. All agree that foreign registration is not enough (see *Atran Transp. Co.* v. *National Mar. Union*, 169 F. Supp. 416, cited by the Supreme Court in the *Marine Cooks Union* opinion, 362 U. S. 365, 371, *supra*). All agree that Congress has power to intrude on the internal economy of a foreign-registered ship as a condition to permitting entry into American ports or waters (see *Benz* v. *Compania Naviera Hidalgo*, 353

U. S. 138, 144-145, 147, *supra*). The unresolved question is as to whether Congress intended its statute to apply to labor relations on a ship which while foreign-registered, foreign-crewed and foreign-owned has an American port as one of the two termini of its fixed, regular shuttle service, conducts an important part of its business from a New York City office and has no office at all in Liberia, the country whose flag its vessels fly. Is it possible to argue that those American "contacts" are sufficient for NLRB jurisdiction? The Federal Supreme Court, whatever answer it may finally give as to that, has already told us in the *Garner* v. *Teamsters Union* (346 U. S. 485, 490) and *San Diego Unions* v. *Garmon* (359 U. S. 236, 244, *supra*) cases that the State courts are "not primary tribunals to adjudicate such issues", that these determinations must "be left in the first instance to the National Labor Relations Board" and, where conduct complained of is "arguably" or "potentially" subject to regulation and the Federal act, "States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" to avert "state interference with national policy". Under the board's *West India Fruit & S. S. Co.* decision (47 LRRM 1269, *supra*) it is, we think, certainly uncertain whether the board could validly or would take jurisdiction of this controversy. Indeed, a complaint by the union against alleged unfair labor practices by Incres has been pending before the board for a year without any decision as to jurisdiction or merits.

The ship in the *West India Fruit & S. S. Co.* case (47 LRRM 1269, *supra*) was the freighter *Sea Level* flying the Liberian flag and owned by a Liberian corporation but operating as a common carrier between Louisiana and Cuba, and with a Cuban crew. Clearly, held the board, she was engaged in "commerce" under the Federal act; the alleged unfair labor practices "affected" commerce under the act

and nothing in the act exempts the maritime industry or seafarers. The "ship-territory" doctrine, said the board, has nothing to do with the territorial reach of the statute (*Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 123) and so there is no "extraterritoriality" to interfere with applying the Federal statute to a foreign ship in American waters. The board concluded that there was nothing to prevent Congress applying this law to events occurring on foreign-registered ships in domestic waters.

The question, said the board, was whether Congress, empowered as it is to regulate such ships while engaged in our foreign commerce, has by this act chosen to do so. The answer, it said, cannot be all inclusive but must under Supreme Court rulings be found by ascertaining and valuing the contacts between the transactions and the governments whose laws are in competition and by weighing the significance of one or more of those contacts (see *Lauritzen v. Larsen*, 345 U. S. 571, 578, *supra*, and *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, *supra*). To warrant application of American law, held the board, not all significant contacts need be American. Neither the "flag law" nor American ownership nor the nonresident status of the crew nor the "internal order doctrine" nor any applicable treaty is necessarily decisive, one way or the other. The board noted that the controversy was between an American union and an American employer, since the owner corporation and its stockholders were American. But the result reached by the board did not necessarily turn on those latter circumstances. The American contacts, held the board, were that the "dispute arose aboard a vessel which engaged exclusively in American foreign commerce, which operates regularly out of an American port, and which is drydocked and regularly provisioned in the United States." The foreign contacts, it said, were "the registry of the vessel and the

nationality of the crew which works under foreign articles signed, however, in the United States." The *Benz* case (*supra*), so the board thought, meant no more than that "the Labor Act does not extend to a foreign flag vessel, its foreign owner and foreign crew absent substantial American commerce". While the board's decision mentions the American nationality of the stockholders of the foreign corporation operating the *Sea Level*, no particular point is made of that "contact" and there is no indication that the result would have been different had the stockholders been nationals of other countries. If the board had meant that domestic incorporation or domestic stock ownership was the essential thing, it could have said so. In *Eastern Shipping Corp.* (44 LRRM 1571 [1959], *supra*) beneficial ownership of the foreign corporation was shown to be 95% foreign, but the board in a nonfinal decision overruled its Regional Director who had dismissed a representation proceeding because it involved labor relations on a "foreign" ship.

All the other arguments against NLRB jurisdiction as put forth by Ineres here, including the "national policy" argument, were rejected in the board's opinion in the *West India Fruit & S. S. Co.* proceeding (47 LRRM 1269, *supra*). It is surely "arguable" that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should, therefore, hold as we did in *Dooley v. Anton* (8 N Y 2d 91, *supra*) that at least until the board refuses jurisdiction the State courts have none.

The judgment should be reversed and the complaint dismissed, with costs to defendants-appellants-respondents in all courts.

Appendix C

DISSENTING OPINION PER FULD, J.

FULD, J. (dissenting). The plaintiff, Ineres Steamship Company, Ltd., owns and operates two ocean-going liners generally engaged in the passenger cruise trade between New York City and Caribbean ports. In the spring of 1960, the defendant Maritime Workers Union organized, picketed and struck those vessels, completely disrupting their operations. The plaintiff thereupon instituted this action for injunctive relief and damages. The court at Special Term, denying a motion made by the defendants to dismiss the suit for lack of jurisdiction, granted the plaintiff the broad injunction which it had sought. The Appellate Division, though it agreed with all that the trial court had decided, modified the resulting judgment so as to limit the injunction "to the condemned [illegal] activity * * * presented in this case". Both plaintiff and the defendants appeal to us as of right.

We are called upon to construe the National Labor Relations Act, for the jurisdiction of the courts over the subject matter of this action depends upon whether the National Labor Relations Board has jurisdiction under that statute. If the Board has such jurisdiction, then, the courts have no authority to act. More specifically, the question presented for decision is whether the Act applies to a controversy affecting a foreign (Liberian) flagship—engaged in foreign commerce bringing it to and from United States ports for short stays—which is 100% owned and controlled by foreign nationals and manned by a foreign crew, recruited and hired in the ship's home port in Italy and serving under foreign articles entered abroad.

In our view, the answer is clearly in the negative. Indeed, as Justice BREITEL observed in his comprehensive opinion for the Appellate Division, such a conclusion finds

strong support in recent decisions of the Supreme Court. (See *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138; *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365; see; also, *Lauritzen* v. *Larsen*, 345 U. S. 571.) "Our study of the Act", wrote the court in the *Benz* case, "leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees" (353 U. S., at pp. 143-144).

The circumstance that there was here substantial continuing American foreign commerce and that the plaintiff had a New York corporation to act as its American agent is not sufficient to render inapplicable the rationale underlying the *Benz* decision and vest the National Labor Relations Board with jurisdiction. All-important in the case before us is the fact that the vessels were owned and controlled by Italian nationals and that their home port was, for all essential purposes, in Genoa; in addition, it might be noted, their crews, entirely alien, consisted largely of Italians who had signed on in Italy under contracts made abroad. In our judgment, if the National Labor Relations Act were to be held to cover the foreign-owned ships here involved simply because they dock in New York City and employ a New York corporation as their American agent, it would follow that the Act applies to give the board jurisdiction over controversies involving seamen on board the great fleets of foreign flag and foreign-owned passenger and cargo vessels while engaged in trips between the Port of New York and the foreign countries.

It is hardly necessary to observe that in terms of comity between nations such a result could not help but have a disastrous effect. When in the *Benz* case the argument was advanced as to the Act's applicability to foreign-owned

ships, the Supreme Court expressed its concern in these words: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts" (353 U. S., at p. 147). Indeed, in *Lauritzen* v. *Larsen* (345 U. S. 571, *supra*), the court had earlier remarked that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction" (p. 582).

We will not impute to Congress—unless the intention is clearly expressed (cf. *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285-286)—a concern to deal with the labor relations of alien seamen on foreign flag vessels, owned by foreign nationals, throughout the world or even while they are in American waters. The fact that our American laws apply to crews, no matter what their nationality, employed on American-owned vessels does not militate against our conclusion. It is the proper concern of Congress in passing labor laws to regulate and control conditions on American ships while they are in American waters, as well as while they are on the high seas and in foreign ports.

A completely different case is presented where the ship, flying a foreign flag of convenience, is actually owned and controlled by American nationals. In such a case—and this is the sort of case which is relied upon to support the argu-

ment and the conclusion that the National Labor Relations Act has given the board jurisdiction (see, e.g., *West India Fruit & S. S. Co.*, 130 NLRB No. 46, 47 LRRM 1269; *Peninsular & Occidental S. S. Co.*, 120 NLRB 1097, 42 LRRM 1113; *Navios Corp.* v. *National Mar. Union*, 402 Pa. 325)—the ship may, in a very real sense, be regarded as sufficiently "American" to justify the invocation of the Federal statute.[1]

It has been urged that, even though it may ultimately be decided that the National Labor Relations Act does not apply to cover the controversy here involved, the pre-emption principles enunciated by the Supreme Court require that this matter be initially presented to the National Labor Relations Board. (See, e.g., *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245; *Dooley* v. *Anton*, 8 N Y 2d 91.) This is clearly not a *Garmon* or a *Dooley* type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity, under the Act. If there is "arguability" here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. In other words, as we have already stated, the question here is whether the Act applies at all to a strike or

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[1] There can be no doubt that in the cases cited the operative fact was ownership by American nationals. Thus, in the *West India* case (130 NLRB No. 46), not only does the board's prevailing opinion remark and stress again and again the vessel's American ownership (e.g., pp. 3, 15, 24, 25, 27, 32), but the dissenting opinion in so many words notes that the majority "have determined that, pursuant to Section 2 (6) and (7), the jurisdictional reach of the Act extends to the operations of American shipowners who register their vessels with, and fly the flags of, foreign nations, and that the policies of the Act will be effectuated by asserting jurisdiction over these shipowners and their operations" (p. 43).

controversy arising out of the organization of the crew of a foreign flag vessel, owned and controlled by foreign nationals and manned by a foreign crew recruited abroad and serving under foreign articles executed abroad.

In point of fact, in the *Benz* case (353 U. S. 138, *supra*), the Supreme Court actually passed upon the issue whether the Act applied to the foreign flagship there involved. Such a determination could not have been made if the pre-emption doctrine were applicable, since that doctrine precludes federal courts—including the Supreme Court—as well as state courts, from taking jurisdiction over activities which arguably involve an unfair labor practice or protected conduct. (See *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245, *supra*; *Plumbers' Union* v. *Door County*, 359 U. S. 354.) But courts, neither state nor federal, need step aside to permit the National Labor Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern.

In sum, therefore, it is our opinion that the National Labor Relations Act does not apply to a foreign flagship owned by foreign nationals, that the board does not have jurisdiction and that such a determination may in the first instance be made by a state court.

As to the further contention advanced by the defendants that section 876-a of the Civil Practice Act bars issuance of an injunction in this case, it is necessary merely to say that, since, as found by the courts below, the defendants' conduct was for an illegal purpose and the means employed by them to accomplish that purpose unlawful (see, e.g., *Southern S. S. Co.* v. *Labor Bd.*, 316 U. S. 31, 38 *et seq.*; *Simpson* v. *Hamburg-Amer. Line*, 1939 A. M. C. 1469, 1480), the injunction issued by Special Term, as modified by the Appellate

Division, may not be successfully attacked as impermissible. (See, e.g., *Goodwins, Inc.*, v. *Hagedorn*, 303 N. Y. 300, 305-306; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101.)

We would affirm the judgment appealed from.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Fuld dissents in an opinion in which Judge Burke concurs and in which Judge Van Voorhis concurs in the following memorandum: I concur in the dissenting opinion by Judge Fuld except that I do not reach the question whether the same result would obtain in case of vessels of foreign registry but domestic ownership.

Judgment reversed, etc.

APPENDIX D

In the Appellate Division of the Supreme Court of the State of New York.

Incres Steamship Company, Ltd.,

Respondent,

against

International Maritime Workers' Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe,

Appellants.

MAJORITY AND MINORITY OPINIONS IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

First Department, July 6, 1960.

Breitel, *Justice.*

The question in this case is whether an American labor union may strike a foreign ship engaged in foreign commerce while such ship is in an American port and, if not, whether a State court may enjoin such activity.

After a trial, Special Term granted a permanent injunction. The union has appealed.

Plaintiff is a Liberian corporation, actually owned and controlled by Italian nationals. It owns two cruise ships, which are registered in Liberia and fly, as a flag of convenience, the flag of that nation. The ships are claimed to have Monrovia, Liberia, as their home port, although it

is conceded that the ships have not been known to have visited that port. The ships, catering largely to American custom, generally ply the sea lanes between New York City and ports in the Caribbean. Their crews are of Italian nationality and are recruited under written articles in Italy. The crews take their leave, and the ships are refitted or repaired in Genoa, Italy, on annual European cruises.

Defendant union is called the International Maritime Workers Union. It was conceived in 1959 at a conference of maritime unions held in London, England, and was formed shortly thereafter by two American maritime unions. Its purpose is to organize foreign seamen employed in ships flying various foreign flags of convenience, which ships are competitive with those that fly the American flag and maintain high labor standards.

The union picketed, organized, and eventually struck plaintiff's two ships while in New York City. As a result the sailings were cancelled. This action ensued and resulted in the permanent injunction which now bars the union from such activity.

There are some peripheral issues and facts raised in the case but they are hardly determinative: The union stresses the American contacts of the ships by pointing out that their affairs are largely managed in New York City, by an agency corporation, controlled and owned by plaintiff, but incorporated in New York. It stresses too that the cruises run by plaintiff originate in New York City and return there. Plaintiff, on the other hand, stresses various disputed acts committed by the union which it claims to be illegal, but which, on the analysis in this case, it is not necessary to reach.

There are some simple conclusions to be first derived, before the more difficult aspect of the cases are considered.

First, the Liberian nationality of plaintiff and the Liberian registry of the ships should not be conclusive of the character of shipping involved. The National Labor Relations Board, in appropriate cases involving "American" ships flying foreign flags of convenience has so determined, and the conclusions are entirely persuasive (*Peninsular & Occidental S. S. Co.*, 120 N. L. R. B. 1097 [7958]; *Eastern Shipping Corp.*, N. L. R. B. Case No. 12-RC-415 [1959], CCH-NLRB Dec. ¶56,698 [1959-1960]). So, too, has the United States District Court in this district (*Afran Transp. Co.* v. *National Mar. Union*, 169 F. Supp. 416 [Bryan, J.], in an especially well-considered opinion, cited with evident respect by the Supreme Court in *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365). Looking beyond the flag of convenience, however, does not change the character of the ships here from foreign to domestic. The shipping is still foreign—Italian in fact—because of Italian ownership, Italian crews, Italian contracts of hiring, and because the ships are engaged in foreign commerce on the high seas. Quite a different case would be presented if the ships were used exclusively or largely on inland waterways, or for that matter, if one or more of the other factors mentioned were changed. This does not mean that a change in any of these factors would require a contrary result. It is that there would then be a doubtful question of applicability of the Federal labor statute and the rule in *Garner* v. *Teamsters Union* (346 U. S. 485) and *San Diego Unions* v. *Garmon* (359 U. S. 236) would apply. (See *Dooley* v. *Anton*, 8 N Y 2d 91.).

Second, in the absence of Federal pre-emption of the field by Federal labor statutes or preclusion of jurisdiction by virtue of labor anti-injunction statutes, the striking or other interference with the internal management of the crew of a vessel away from its home port is illegal (*Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31). Such inter-

ference is illegal because it violates public policy, and, in the case of an American ship, is even a criminal act (U. S. Code, tit. 18, §§2192, 2193). Thus, in the *Southern S. S.* case, it was held that the National Labor Relations Board could not order the reinstatement of seamen discharged for striking an American ship away from its home port even though it had also found that the men had struck because of the employer's unfair labor practices in violation of the then National Labor Relations Act. The court said (pp. 38-39): "Ever since men have gone to sea, the relationship of master to seamen has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority. We shall consider in a moment the nature and scope of the criminal sanctions imposed in case of revolt and mutiny. But it is worth noting here that the form of the 'shipping articles,' which the master and every member of the crew must sign prior to the voyage, has been carefuly prescribed by Congress, and that these articles contain this promise: 'And the said crew agree * * * to be obedient to the lawful commands of the said master * * * and their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore * * *' U. S. C., Title 46, §§564, 713. On the other hand, workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and

watches, wages, and return transportation to this country if destitute abroad. U. S. C., Title 46, §§651-692, 1131. It is in this setting of fact and law that we must test the validity of the Board's order of reinstatement." The court went on to find that "the strike was unlawful from its very inception" (p. 48). The policy underlying this principle in the law of the sea is one that has had recognition for a long time, and insofar as foreign ships are concerned, has special vitality because of the comity among nations (cf. *Wildenhus's Case*, 120 U. S. 1; *Lauritzen* v. *Larsen*, 345 U. S. 571).

Third, apart from the question of public policy pervading foreign shipping, and particularly the law of the sea as to the management of a ship's crew, the union activity would be privileged? That is, the economic self-interest of American workers to protect themselves from the competitive depredations of others using foreign labor working under substandard conditions would provide just cause for the intentional economic injury directed to such competition (see Frankfurter and Greene, Labor Injunction, 24 *et seq.*; Forkosch, Treatise on Labor Law, 398 *et seq.*; *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 260). While most of the cases and most of the commentators have considered only domestic disputes, the same principle of justification which applies in the domestic dispute in reason and policy should apply to one involving foreign commerce,* provided of course, no other overriding policy or law makes the activity illegal.

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* On this analysis, there is disagreement with the conclusion of the trial court that defendant union did not have an economic self-interest in seeking to organize plaintiff's ships, which interest might justify the union's economic activity, provided its methods did not fail of legality for other reasons, such as interference with the ship's discipline, secondary boycott, and the like.

On application of but these three conclusions last discussed, the union's activity was wrongful and not privileged, because it interfered with the engagement and management of the ships' crews while the ships were away from the home port. For this purpose, obviously, Monrovia is not the home port, but neither is New York City, merely because the latter is the most important port in the traffic carried by the ships. For the purposes of this *de facto* Italian line, it is evident that Genoa in Italy is the home port.

But the discussion may not be concluded at this point. The questions still remain whether there has been Federal preemption by virtue of the Federal labor statutes and whether there are any jurisdictionally inhibiting labor anti-injunction statutes.

The Supreme Court has held that the National Labor Management Relations Act does not apply to foreign shipping. In *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138, 142-144), the court said, referring to the Federal Labor Management Relations Act:

"The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not 'cover a dispute between a foreign ship and its foreign crew' • • •

"Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Later, in *Marine Cooks* v. *Panama S.S. Co.*, (263 U. S. 365, 369), the court, speaking of its holding in the *Benz* case, said: "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the

internal labor relations of a foreign ship and its foreign workers under contract made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not "pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law."

Notably, the Supreme Court did not hold that there was a Congressional abstention from regulating in the field, so that there might be a pre-emption by silence, that is, an intention to leave the area of foreign shipping untrammelled by the several regulatory prohibitions and protections provided in the Federal statute. Instead, it held that Congress did not intend to apply the Federal statute at all to foreign shipping. In consequence, the rule in *Garner* v. *Teamsters Union* (346 U. S. 485, *supra*) and *San Diego Unions* v. *Garmon*, *supra*, (359 U. S. 236, *supra*) is similarly inapplicable.

True, in this case, as distinguished from the *Benz* case, the contact with the American port is regular rather than a one-instance occurrence. But, in both cases, the custom is American: in the one a cargo of wheat was to be taken on for transhipment, while in the other it consists of American passengers. The distinction is not sufficient to avoid the impact of the holding in the *Benz* case.* Moreover, until

* "But application of American statutes to labor relations on board foreign oceangoing vessels only tranitorially in United States waters presents different problems and must be considered in light of principles of international law. Under settled doctrine, ports and adjacent waters are within the sovereign territory of the coastal state, which may, therefore, prohibit access by foreign vessels or permit entry only on such conditions as it may choose to impose. The absolute power of the coastal state is tempered, however, by the demands

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the Supreme Court narrows the major premise of the holding in the *Benz* case, a State court is concluded by it.

In the airline field there is an example of intentional Congressional abstention from applying a labor statute to events and relationships occurring in foreign commerce outside the continental United States. Thus it has been held that the Railway Labor Act (U. S. Code, tit. 45, §151 *et seq.*) does not apply to employees of American airlines engaged in flights between points outside the continental United States, based entirely and exclusively on legislative intention (*Air Line Stewards* v. *Northwest Airlines*, 267 F. 2d 170, cert. denied 361 U. S. 901; see, also, *Air Line Dispatchers Assn.* v. *National Mediation Bd.*, 189 F. 2d 685, 690, cert. denied 342 U. S. 849).

Consequently, it is not possible to find that the Federal labor statute applies to foreign shipping or to the dispute

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of comity among nations, which require it to exercise a high degree of self-restraint, particularly in matters involving the 'internal economy' of a foreign vessel.

"In determining whether to exercise its sovereign prerogatives, the coastal state must consider its self interest shared with other nations—an 'inclusive' interest—in free commercial navigation in addition to the local interests which it seeks to protect by exercise of jurisdiction—its 'exclusive' interests—and the exclusive interests of foreign states. Regulation which constitutes an unreasonable interference with the internal economy of foreign ships may evoke defensive exercise of jurisdiction by other coastal states, thus subjecting oceangoing vessels to different laws in every port. For example, if a coastal state required that every vessel entering its waters employ a crew consisting entirely of the coastal state's nationals, other states might be forced to respond by comparable legislation, and mutually beneficial world trade would be brought to a virtual standstill." (Comment: The Flag-of-Convenience Fleet, 69 Yale L. J. 498, 504-505.)

which gave rise to this case. Hence, there is no Federal pre-emption ousting the State courts of jurisdiction.

The Federal labor anti-injunction statute (U. S. Code, tit. 29, §101 *et seq.*) applies, of course, only to the Federal courts. In *Maring Cooks* v. *Panama S. S. Co.* (362 U. S. 365, *supra*), it was held that the Federal anti-injunction statute deprived Federal courts of jurisdiction to enjoin illegal labor union activity in foreign shipping, even though the Federal labor statute (Labor Management Relations Act) did not apply. In brief, it was held that the anti-injunction statute had a broader applicability than did the regulatory labor statute.

While it is true that New York's labor anti-injunction statute (Civ. Prac. Act, §876-a) was closely fashioned after the Federal statute, and it is even arguable that it was intended to be even more restrictive of judicial labor injunctions, the New York statute has been much more narrowly defined by the highest court of this State. It has been held that, in order for a dispute to qualify under the statute as a "genuine labor dispute", the dispute must have had a "lawful purpose". (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y., 300, 305; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101; cf. *Florsheim Shoe Store Co.* v. *Shoe Salesmen's Union*, 288 N. Y. 188; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226; *Opera on Tour* v. *Weber*, 285 N. Y. 348; *Thompson* v. *Beckhout*, 273 N. Y. 390; see *Max's Furs & Ready-to-Wear* v. *Bauer*, 282 N. Y. 334; *Arnold Bakers* v. *Strauss*, 1 A D 2d 604, 608, appeal dismissed 2 N Y 2d 721.) As a novel question one might well quarrel with such a rendition of the statute, but the weight of authority is hardly escapable by an intermediate appellate court.

Consequently, it is concluded that no labor anti-injunction statute precludes the State court from enjoining the "illegal" activity of defendant union in striking plain-

tiff's ships and picketing for the purpose of inducing a breach of the articles of hiring of the ships' crews and the disciplines of the ships.

In reaching these conclusions one is aware of the substantial competitive effect of these foreign flag ships upon the condition of the American seaman. But the problem is one for Congress. It has the power to take whatever action is necessary, for the solution is largely limited only by its own discretion (*Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 142, *supra*). Indeed, the Federal Government has not hesitated in many areas to intrude on the "internal economy" of a foreign ship as a condition to entry into American ports (see *Benz* case, *supra*, pp. 144-45). It is one thing for Congress to intrude in this field; it would be quite another for the courts to do so. This was expressed succinctly in the *Benz* case: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." (p. 147.) A State court can hardly say less; it should not say more.

On the foregoing reasoning the order and judgment granting a permanent injunction should be substantially affirmed. In one respect, however, it requires modification. The second ordering paragraph should be modified to provide that the words "also from picketing said vessels for any purpose" should read "also from picketing said vessels for any such purpose", the word "such" being necessary to limit the injunction to the condemned activity as presented in this case.

Accordingly, the order and judgment should be modified, on the law and the facts, and in the exercise of discretion, to insert the word "such" in the second ordering paragraph as hereinabove-mentioned, and should otherwise be affirmed, with costs to plaintiff-respondent.

Botein, P. J. (dissenting). Plaintiff, a corporation organized under the laws of Liberia, operates two cruise vessels under the Liberian flag. All of plaintiff's officers and shareholders are foreign nationals; and the ships are manned by alien crews hired at Genoa, Italy. No Liberian citizen, however, plays any role in either the management of plaintiff or in the operation of its ships.

All of plaintiff's cruises originate in New York, and its passengers are principally Americans. Plaintiff occupies common office space in the City of New York with its agency, a New York corporation. Plaintiff's president is also an officer and director of the agency, which sometimes alone, sometimes jointly with plaintiff, provisions the ships, books passengers, schedules departures and arrivals and attends to ships' repairs—all out of the New York office.

Defendant International Maritime Workers Union was formed recently by two large maritime unions affiliated with AFL-CIO. An avowed major purpose, recited in the preamble to the union's constitution, is to bring strong and responsible union representation to the crews of ships flying so-called "flags of convenience". Defendant union contends that plaintiff's ships fall into this category, and that their victimized crews are denied human dignity, decent wages and working conditions. When plaintiff's vessels ply regularly in and out of New York, the union claims their substandard labor conditions also pose a real menace to the preservation of the high, hard-won standards prevailing on American flag vessels under contract with American maritime unions.

Appendix D

Representatives of the union made contact with crew members aboard both of plaintiff's vessels, for the purpose of organizing them, to the end that they would be represented by the union. They also picketed both ships upon their arrival in New York Harbor and were successful in preventing their scheduled departures. The picketing at all times was orderly and peaceful—in fact, the pickets never exceeded three in number.

Plaintiff served a summons and complaint seeking a permanent injunction and damages of defendant union and its executive director. Following trial an order and judgment were entered, denying defendants' motion to dismiss the complaint on the ground the court lacked jurisdiction over the subject matter, permanently enjoining defendants from interfering in any way with the operation and management of the two ships and from picketing them for any purpose and severing and reserving plaintiff's claim for damages for later trial.

In holding that jurisdiction resided in the State courts, the Justice at Special Term relied solidly on the 1957 decision of the Supreme Court in *Benz* v. *Compania Naviera Hidalgo, S. A.* (353 U. S. 138), which he said was "squarely on all fours with the instant case". In the *Benz* case, as here, the vessel, a foreign tramp steamer, flew the Liberian flag, had foreign owners, and the crew complement was composed of foreign nationals. Unlike the fact situation presented here, however, the owners of the steamer in the *Benz* case had no office or agents in the United States, and the ship did not receive the major part of its business from American nationals nor visit an American port regularly; and after a single, initial, fairly haphazard contact with an American port the steamer left United States territorial waters and thereafter had no charter commitment to return. Again, unlike the instant

case, in which a union has sought directly to organize foreign seamen on a foreign ship to preserve, among other things, American wage and working standards, in *Benz* the unions were interested primarily in the internal economy of the ship and picketed out of sympathy for a strike of foreign seamen.

As the opinion itself indicates, the *Benz* case had rather special facts (p. 142): "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

The compass of the *Benz* holding was recently outlined succinctly in *Marine Cooks* v. *Panama S.S. Co.* (362 U. S. 365). In the latter case the Supreme Court said (p. 369): "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not preempt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law."

The court in this later case was again confronted with the picketing of a Liberian ship, manned by an alien crew. In this situation, however, there was no labor dispute between the ship's employees and the ship's management. The picketing, carried on by an American union, was to protest the loss of AFL-CIO seamen's livelihood to foreign

flag ships with substandard wages and conditions. In these circumstances the Supreme Court rejected the District Court's assumption of jurisdiction to issue an injunction on that court's stated ground that the picketing was an "unlawful interference with foreign commerce" and interfered "in the internal economy of a vessel registered under the flag of a friendly foreign power". This position had been also adopted by the Court of Appeals, in reliance almost entirely on the holding in the *Benz* case (265 F. 2d 780, 786 [C. C. A. 9th, 1959]).

While the Supreme Court in *Marine Cooks* expressly bottomed its dismissal of the petition for an injunction on the limitations upon the courts' jurisdiction imposed by the Norris-La Guardia Act (U. S. Code, tit. 29, §101 *et seq.*), it gave expression to some intriguing dictum. In a footnote (p. 371) the court pointed to the special facts present in the *Benz* situation (362 U. S. 365, 371-372 n. 12): "Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. For a thoughtful discussion of the impact of foreign employment upon American labor standards, see *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 1959 Am. Mar. Cas. 326 (holding that the Norris-La Guardia Act withdrew from Federal District Courts jurisdiction to issue labor injunctions in a labor dispute strikingly like the one here involved). But see *Fianza Cia. Nav. S. A.* v. *Benz*, 1959 Am. Mar. Cas. 1758, 37 CCH Lab. Cas. ¶65,495."

Therefore, in the *Benz* case not only were there no substantial American contacts with the ship operated under the foreign flag of convenience, such as are present in this case; but the picketing by the unions was evidently viewed as prompted essentially out of sympathy for the objectives of foreign seamen on a foreign boat, and not to better the lot of American sailors. The three domestic unions, by injecting themselves into this wholly foreign dispute, placed themselves in the traditionally dangerous position of strangers intermeddling in a family fight.

It has been argued forcefully that the considerations of "international relations", "possibilities of international discord", etc., which so troubled the court in the *Benz* case when contemplating the applicability of the Labor Management Relations Act to foreign ships with foreign crews, are relevant with regard to the rights guaranteed to employees under section 7 of the act but are not relevant with regard to the prohibitions of section 8 of the act. (Comment *"The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing."* 69 Yale L. J. 498, 516, 523.)

The National Labor Relations Board had in a somewhat similar situation refused to apply the protections of section 7 of the act while enforcing the prohibitions of section 8. (Cf. *Matter of Sailors' Union of Pacific [Moore Dry Dock Co.]*, 92 N. L. R. B. 547 [1950], with *Compania Maritima Sansoc Limitada*, Case No. 20-RC-809 [5/1/50], CCH NLRB Decisions 1950-1951, ¶10,081.) Only the dissenter in *Benz* accepted this argument (353 U. S. 138, 147-150). (Cf. *Teamsters Union v. New York, New Haven & Hartford R. R. Co.*, 350 U. S. 155 [1956].)

Even at common law it was recognized that the deck of a visiting ship afforded no sanctuary from certain rights of local government; and that "all things done on board

which affected only the vessel or those belonging to her, and *did not involve the peace or dignity of the country, or the tranquility of the port*, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged" (*Wildenhus's Case*, 120 U. S. 1, 12 [1887]) (emphasis supplied).

The instant case would appear to rest somewhere between the situations posed in *Benz*, on the one hand, and *Marine Cooks*, on the other. Defendants here were picketing not only on behalf of the foreign employees of a foreign ship, as in *Benz*, but on their own behalf, as in *Marine Cooks*. And whatever might be plaintiff's status under international law, by all practical labor relations reckoning its operations are as singularly domestic as though its ships sailed the Great Lakes.

If the *Benz* rule is applicable to all ships flying flags of convenience, it apparently has not been followed by the National Labor Relations Board as devoutly as it should have been by the tribunal endowed with "exclusive primary competence" (*San Diego Union* v. *Garmon*, 359 U. S. 236, 245) in these matters. In *Peninsular & Occidental S.S. Co.* (120 N. L. R. B. 1097 [1958]) the board found jurisdiction and distinguished the *Benz* case where "the employer, as we have found above, is a domestic corporation, not a foreign national and the crews include a number of American citizens and resident aliens. Moreover, the crews do not sign shipping articles containing conditions of employment prescribed by a foreign government, but rather sign old type American articles. As for the ships, their home port is, for all practical purposes, at Miami, Florida. Further, though they are registered under foreign laws, they clearly do not operate under foreign laws, the crews, as noted, signing American shipping articles and the only inspections of these ships being performed by agencies of the United States Government." (120 N. L. R. B. 1097, 1101-1102, n. 7.)

In the most recent case the union, evidently unable to establish indirect American ownership of the ships flying flags of convenience, as in *Peninsular & Occidental*, urged instead that jurisdiction should be asserted by the National Labor Relations Board regardless of the nationality of the owner of the vessel. The Regional Director dismissed the petition for an election, but the board ordered the petition reinstated to resolve the substantial and material issues presented (*Eastern Shipping Corp.-McCormick Shipping Corp.* [*S. I. U.*], 12-RC 415 [9 21 59], CCH NLRB Dec. 1959-1960, ¶56,698).

Accordingly, the National Labor Relations Board apparently does not consider the fact that the employer is a foreign entity operating a ship under the flag of a foreign country as an insurmountable barrier to the assertion of its jurisdiction in labor disputes. For all that appears, the board may take the view that its jurisdiction is proscribed by the *Benz* case only when some pre-existing, previously confined shipboard dispute spills onto the dock, where an American union lends a hand. (Cf. Comment Yale L. J., *op. cit. supra*, p. 521.) Short of that, the board may take the position that, while it will not afford relief under section 7 because of possible conflict with settled rules of international law and principles of comity, it will enforce the prohibitions of section 8 against an American union which engages in prohibited concerted activity directed against a foreign ship regularly doing business in a United States port. It must be borne in mind that the board may maintain jurisdiction if it has the statutory power either to protect or prohibit the activities in issue.

In such event, and at the very least, it can be argued strongly that this controversy involves rights and obligations exclusively within the primary jurisdiction of the National Labor Relations Board, to which under the Labor Management Relations Act both State and Federal courts

must defer when conduct complained of in a labor dispute is either protected or proscribed by the act. The basis and rationale of this policy are stated in *Garner* v. *Teamsters Union* (346 U. S. 485, 490-491): "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and especially constituted tribunal and described a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies • • •. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261."

In *San Diego Unions* v. *Garmon* (359 U. S. 236, 244) the Supreme Court defined the boundaries of judicial action still more sharply, holding that when "an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (p. 245). The court stated (pp. 244-245): "At times it has not been clear whether the particular activity

regulated by the States was governed by '7 or '8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board."

Chapter 7 of title 29 of the United States Code will be searched in vain for language to support the contention that by statutory inhibition the jurisdiction given the National Labor Relations Board by the Labor Management Relations Act does not encompass labor disputes involving "foreign" ships. The term "commerce" includes "trade, traffic, commerce, transportation * * * among the several States * * * or between any foreign country and any State * * * or between points in the same State * * * but through * * * any foreign country" (§152, subd. [6]). The term "affecting commerce" includes "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (§152, subd. [7]).

We are told that Congress created the National Labor Relations Board to provide reasonable measures to prevent the disruption of "interstate and foreign commerce" (*Consolidated Edison Co.* v. *Labor Bd.*, 305 U. S. 197, 221-222 [1938]). That the dispute at issue in this case has disrupted "foreign commerce" is beyond argument. The decision in the *Benz* case, relying as it does exclusively on negative legislative history, must be confined rigorously to the fact situation presented by that case. Otherwise, the finding that the Labor Management Relations Act does not apply to "wage disputes arising on foreign vessels between

nationals of other countries when the vessel comes within our territorial waters" (353 U. S. 138, p. 142) would ignore the plain provisions of the act. Throughout the *Benz* case the court carefully limits the scope of its decision by restrictive language such as "such disputes" and the "circumstances such as those posed here" (pp. 142, 144).

Accordingly, neither the act, the board nor the Federal courts have ever held that the plain terms of the Labor Management Relations Act do not encompass "foreign" shipping. To the contrary, the board and the courts have indicated that the act may apply when a union of American workmen takes collective action against a foreign ship in the interest of preserving "the terms and conditions of their employment" by stabilizing "competitive wage rates and working conditions within and between industries" (U. S. Code, tit. 29, §151). (Cf. *Afran Transp. Co. v. National Maritime Union, op. cit. supra; Eastern Shipping Corp. [S. I. U.], op. cit., supra.*)

Accordingly, the order denying defendants' motion to dismiss the complaint for lack of jurisdiction should be reversed and the motion granted; and the judgment granting a permanent injunction should be reversed and the complaint dismissed, both reversals on the law and the facts.

VALENTE and MCNALLY, JJ., concur with BREITEL, J.; BOTEIN, P. J., dissents and votes to reverse and dismiss the complaint in opinion, in which STEVENS, J., concurs.

Order and judgment modified, on the law and on the facts and in the exercise of discretion, to insert the word "such" in the second ordering paragraph as mentioned in the opinion of Mr. Justice BREITEL, and, as so modified, affirmed, with costs to plaintiff-respondent.

Settle order.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff,

against

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

ORAL OPINION OF JUSTICE HENRY CLAY GREENBERG GRANTING PERMANENT INJUNCTION

Decided May 25, 1960

GREENBERG, *Justice.*

The Court: (Greenberg, J.) Gentlemen, as I have said repeatedly, this case has given me considerable pause and concern, because, in a way, it presents, perhaps, a new principle of law, particularly in so far as the State Courts are concerned. In another way it presents nothing particularly new or novel from the standpoint of Labor management relations, except in so far as the principles and the facts are concerned, the relationship between the seamen and the Master of a ship and the relationship between the seamen of that ship and the American Union.

First let me state that when this case originally started on the first motion made to dismiss because of lack of jurisdiction in the court the Court got the distinct impression that the defendant Union here urged strongly that it was in no way involved in this strike; that it did not call the strike, and that the seamen aboard the *Nassau* and the *Victoria* on their own volition initiated such acts as have

been portrayed here in the course of the trial. Thereafter, while Mr. Wall was on the stand, and again this morning Mr. Ostrin, counsel for the defendants, has stated that the strike was called by an American Union. So I think we can start with the accepted proposition, in contradistinction to the position taken by the Union at the beginning—I hope I am not wrong in this—that the American Union, the defendant herein, has been the moving and motivating spirit in the organizing of the seamen on the S/S *Nassau* and the S/S *Victoria* and had been responsible for the strike which was called and the ensuing picketing.

I have gone over this lengthy record, covering more than four hundred pages, and have tried strenuously to orient myself to the attitude of the Labor Union in this case, as well as the position taken by the plaintiff herein. I have carefully considered again the Benz case and the Marine Cooks & Stewards case, and I want to say to Mr. Ostrin that I have boundless respect for the judgments and opinions and views of Judge Frederick Van Pelt Bryan, upon whose opinion in the Afran case he placed so much stress. However, as an umpire in a baseball game, in a sense, I am called upon to call the shots, to use an expression of Judge Learned Hand, as I see them. If there be error committed by me, that error may be corrected by a higher tribunal.

We must start out with the proposition, to be sure contested to some extent by the defendants, that the operation of the *Nassau* and the *Victoria* was a distinctly foreign operation. The evidence shows that the vessels were foreign owned, foreign controlled, and that the seamen aboard the two vessels were all concededly foreign nationals; that they were recruited abroad and that they undertook employment pursuant to agreement effected in a foreign jurisdiction. Also, these ships were flying a foreign flag that came into this country under foreign registry.

Appendix E

I am aware of the fact, of course, that the Ineres Steamship Company has an agency in America, and that it is claimed by the defendants that this agency transformed the operation from a strictly foreign operation, at least to a partial American operation. I cannot subscribe to this argument by the defendants in this case. True enough, Mr. Wolfson, of the American corporation, had a measure of control. True enough, there was a relationship between the president of the foreign company and Mr. Wolfson of the American company. The fact remains, nevertheless, that even though there was an American agency here, this corporation, Ineres Steamship Company, Ltd., must be deemed, and the Court concludes, that it is a foreign company which had its control not only of the corporate affairs, but over the internal affairs, economic and otherwise, of the two ships, the SS. *Nassau* and the SS. *Victoria*.

I am unable to find that there is a dispute between an American union in furtherance of legitimate American trade union objectives, against Ineres. I cannot find that there is a dispute between an American union in furtherance of legitimate American trade union objectives and an American corporation, to wit, Ineres Line Agency, Inc. On the contrary, I think the record speaks overwhelmingly in favor of the conclusion reached by the Court that this strike was undertaken in the first place, by an American union for the purpose of organizing foreign nationals bound under articles of an agreement with a foreign corporation on ships which were controlled by Masters who also were foreign. In the second place, it cannot be said that there is a labor dispute between an American union, either at common law in the purview of Section 876-a of the State Law or in the light of the Federal Labor Relations Act. Indeed there could not, on the basis of this, be a labor dispute between the instant parties.

It seems clear to me, in spite of the studied effort on the part of the defendants to bring themselves within the arena or the orbit of the Marine Cooks & Stewards case, that there was not a fight or a contest on the part of an American union in furtherance of legitimate American trade union objectives. Mr. Wall on the witness stand was hard put to answer the questions addressed to him by counsel and by the Court to show how the organizing of the seamen on these two vessels would affect legitimate American trade union objectives.

May I say parenthetically at this point, and not by way of apology, or defense, that this Court has shown by many of its decided cases, it has demonstrated a complete sympathy for the aspirations and legitimate objectives of the American trade union movement.

In cases which have gone to the Court of Appeals and in one instance to the Supreme Court of the United States, this Court went a far way in protecting the right of Labor to conduct an organization picketing campaign for a period of almost two years. And while this Court has suffered a reversal at the hands of the Appellate Division by a divided Court, the Court of Appeals equally divided four to three, sustained the views this Court had advanced.

I mention this so that the defendants will know, as well as the plaintiff, that labor has been a deep and abiding concern with this Court. At the same time, as a sworn judicial officer I am compelled to dispose of these matters on the basis of the facts and on the law as I construe it.

Now, here we have a case which in my judgment, upon reflection and consideration, falls squarely within the four corners of the Benz case and even within the general language employed by Mr. Justice Black in the Marine Cooks and Stewards case. There the Learned Justice of the Supreme Court said in two places in his opinion:

"The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict federal court jurisdiction in controversies involving labor disputes. Nothing was said or intimated in Benz that would justify an inference that because a state court has jurisdiction to award damages in labor disputes, the United States Courts have the power to issue injunctions in like situation."

And again almost at the conclusion of the opinion the Justice said:

"There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under state or federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now we come down to the real heart or meat of the case and that is this: Does an American Union consisting of American Nationals have the right and the power to instigate a strike, to organize foreign Nationals on a foreign registered boat and cause picketing to be thrown, in a sense, around these boats and thus interfere with the internal economy and affairs of these boats?

We have already alluded to the specific relationship which exists between the Master of a ship and the crew. And I think therein lies the great distinction between the factual picture presented here and the analogy sought to be drawn by Mr. Ostrin in the case where a foreign National had come into this country and had gone into business and then had imported foreign Nationals who were not citizens to conduct that business here. There is not that relationship which exists between a Master and

a crew, where for the safety of the ship and the passengers the Master has the Supreme power to conduct its affairs without any interference by any outside agency, whether it be an American Union or some other agency.

These ships have come into this country and, true, are subject generally to our laws: health, labor laws, generally where certain requirements are made under the State law or the Federal law. But when we deal with the situation—and therein I draw a distinction which might be deemed by the defendants to be a very fine, thin and narrow one—where we come to deal with the matter of seeking to interfere, and that is precisely what happened here and there is no escape from it, with the internal management of a ship which has come into this port, with foreign Nationals, foreign owned, of a foreign nation. Does that American Labor Union have the right, I repeat, to organize the members of that ship; the crew, the stewards and the others, and to cause a strike to be called at the pier? The answer of this Court is that it does not have that power under any of the decided cases drawn to the attention of this Court, as the Court itself construes those cases. If that is the fact, then obviously an act or any act on the part of the American Labor Union, in calling a strike of the seamen and others on board these ships constituted an interference with the management and the economic affairs of that ship and resulted in a prima facie tort in so far as the ships themselves are concerned. In the view of this Court they had no right to go aboard that ship even with the permission of the Captain for the purpose of organizing the members of the crew and others. They had no right to call a strike and they had no right to picket this ship.

I base this conclusion not alone on the *Benz* case which would be sufficient, because there Mr. Justice Clark was

careful to point out that in his research of the debate in Congress and the notes there taken that the purpose of the Norris-LaGuardia Act was to protect American seamen dealing with American business interests. That was the central theme and the motivations for the enactment of that Act. Here, however, the situation is completely different. We are dealing with, and I regret to have to repeat this again, an attempt on the part of an American Union which is seeking, according to this record, not to protect the economic position of American seamen but is seeking to organize the members of the crew for its own purposes, that is, for the purposes of the defendant International Maritime Workers Union.

I have considered, although briefly, the supplemental memorandum submitted by the defendants but I am not persuaded that they have been able to place the facts in this case within the four corners of the ambit, to use Mr. Ostrin's word, of the Marine Cooks and Stewards case.

Mr. Justice Black was careful, as I said, in the disposition of the original motion, to point out the distinction between the Benz case and the facts in the Marine Cooks & Stewards case, and that very distinction is the basis for the disposition now being made by this Court.

I should like to allude to the decision of the Supreme Court in Southern Steamship Company against N. L. R. B., reported in 316 U. S. 31, a 1942 decision, wherein the Court held that seamen who engaged in a strike on board a vessel tied up at a dock, away from its home port, were not entitled to reinstatement by the N. L. R. B. following their discharge, and the Court specifically rejected the argument, as I have read the case, that the situation was different where the ship was tied to a dock. To all intents and purposes, while subject to American laws, it is still a foreign owned, foreign operated, foreign registered ship, and therefore was

controlled by foreign laws in so far as the internal operation and management of the ships are concerned. Accordingly, this Court concludes that the defendants in this case had no right either under the Federal Act or the State Act, to call a strike or to picket the ships Nassau and Victoria. If they had no right to call the strike and to picket, they were interfering with recognized international rights under international treaties with the ownership of the ships Nassau and Victoria, and, further, this interference constituted a tort which this Court is not called upon to protect and should not protect.

I think that it would present a most intolerable situation if we were to permit or if the Courts were to permit an American union, however laudable the objectives may be, and I think they are laudable, at least as shown by the articles of incorporation, or the constitution—I repeat, it would present an intolerable situation to permit an American union to interfere with the recognized rights of foreign nationals, of the crew, where a boat is foreign registered and foreign operated and controlled, even though that management is shared in part by an American agency resident in this country.

I find that there is no basis for the picketing in the light of the law as I construe it, and, accordingly, the Court grants the injunction, a permanent injunction, on the basis of the stipulation entered into between the parties.

You may settle findings and conclusions of law and judgment, although the Court states that its oral decision here rendered is in compliance with the appropriate provisions of the Civil Practice Act, with an appropriate exception to the defendants.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

[SAME TITLE]

ORAL OPINION OF JUSTICE HENRY CLAY GREENBERG DENYING DEFENDANTS' CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION

Decided May 19, 1960

GREENBERG, *Justice.*

The Court: And I must confess that, while the matter is not free from doubt, I have come to the conclusion that jurisdiction resides in the State Court. I have come to that conclusion on the basis of my very careful study last night of the principal authorities cited to the Court, namely Benz *vs.* Compania etc., reported in 353 U. S. 138, and Marine Cooks and Stewards *vs.* Panama Steamship Company, a very recent case decided on April 18, 1960, reported in the Supreme Court Reporter, Volume 80, No. 12, at page 779, *et seq.*

Mr. Justice Clark in the Benz case was very careful to note that: "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to

extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill."

Then, Mr. Justice Clark stated: "The problem presented is not a new one to the Congress." He then continues to consider the Seamen's Act of March 4, 1915, and draws a distinction between that Act and the one under consideration now, to show that where Congress intended to speak in regard to seamen's affairs, particularly foreign nationals, it did so in explicit language in the Seamen's Act of March 4, 1915, but was completely silent in the act which is involved in this case.

I do not think it is necessary for me to recite the facts in the Benz case as it is clearly in the minds of both of the respective parties here. And that case would seem to be squarely on all fours with the instant case, and would leave no doubt in the Court's mind but for the holding and some of the language in the Marine Cooks and Stewards case, alluded to before. If this case were to be decided solely upon the decision in the Benz case, the Court would be left with no alternative but to hold that the State court has jurisdiction in the instant case, as Congress has not undertaken to speak in relation to ships under foreign register involving seamen of foreign origin and nationals of a foreign jurisdiction.

We come now, before I allude to the facts here, to the holding in the Marine Cooks and Stewards case. There Mr. Justice Black undertook to distinguish the two cases, and he said as follows: "The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a Federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict Federal court jurisdiction in contro-

versies involving labor disputes. Nothing was said or intimated in Benz, that would justify an inference that because a State court has jurisdiction to award damages in labor disputes the United States courts have the power to issue injunctions in like situations."

In a footnote Mr. Justice Black said: "Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on the behalf of the foreign employees as in Benz."

I think that distinction is persuasive on the contested issue of jurisdiction in this case.

Then Mr. Justice Black said: "There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under State or Federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now taking up the facts in the instant case: We find in the record, without dispute, that the *Nassau* and *Victoria* were completely foreign owned, dominated and controlled; that the seamen on those ships were foreign nationals; that the officers of the Ineres Steamship Company, Ltd. were foreign nationals, although from time to time some of them were temporarily resident in this State.

Under these circumstances it would appear to me that the picketing in this case was not for the purpose of pro-

tecting the economic interests or the jobs of American seamen but for the purpose of protecting or acting in sympathy with the foreign national seamen aboard the *Victoria* and the *Nassau;* and that, therefore, would bring it squarely within the holding in the Benz case as pointed out by Mr. Justice Black in the succeeding case—the name always escapes me—in the Marine Cooks and Stewards case, wherein he undertook to draw a distinction between the holding in the Benz case and the holding in the Marine Cooks and Stewards case.

On the authority of these two cases and the language there employed and the reasoning, as well as on the basis of the undisputed facts in the instant case, the Court is constrained to reach the conclusion, as it announced at the outset, that the State court in the circumstances here present has jurisdiction. And therefore the motion by the moving defendants to oust the Court of jurisdiction is denied, with an exception to the defendants.

APPENDIX G

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION WITH THE REPUBLIC OF LIBERIA

August 8, 1938, 54 Stat. 1739, T. S. No. 956

(effective November 21, 1939).

Article VII:

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Article XV:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED (TAFT-HARTLEY)

61 Stat. 136 (1947), 29 U. S. C. §141.

Section 141 [June 23, 1947, 3:17 p. m., E. D. T., c. 120, §1, 61 Stat. 136]:

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 152 [July 5, 1935, c. 372, §2, 49 Stat. 450; June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, §101, 61 Stat. 137]:

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • •

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

• • •

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted]

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 469.

INCRES STEAMSHIP COMPANY, LTD.,
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against

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Opinions Below.

The opinions in the courts below are correctly cited and reprinted in the petition.

Statute Involved.

The statute involved is the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. A. 141, *et seq.*, reprinted in part in Appendix G of Incres' petition.

Summary of Arguments Against the Granting of the Petition.

1. This Court, on April 21, 1961, denied certiorari in *Navios Corporation* v. *National Maritime Union*, 402 Pa. 325 (1960), 81 S. Ct. 1047, a case involving the identical

question posed by the instant petition. Application for reargument was denied on May 29, 1961, 81 S. Ct. 1658.

2. The National Labor Relations Board has asserted jurisdiction over foreign-flag vessels engaged in American commerce. *West India Fruit Co.*, 130 NLRB No. 46, 47 LRRM 1269 (1961); *Peninsular and Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (July 10, 1961), and *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (August 10, 1961). The New York Court of Appeals therefore correctly applied *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

3. Review by this Court of the question at issue should be entertained, if at all, where the NLRB is a party to the proceedings. Such opportunity will undoubtedly arise after the United States Court of Appeals for the 5th Circuit decides *West India* (*supra*), now before it on the company's petition for review and the Board's cross petition for enforcement of its order.

4. Since there has been no exhaustion of the administrative processes of the NLRB, which is presently considering the dispute between the parties, there is no warrant for judicial intervention at this time. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938).

Statement of the Case.

The Parties.

Petitioner (plaintiff below) Incres Steamship Company, Ltd. (hereinafter called "Incres") operates two luxury ocean liners in the cruise trade between New York City and Caribbean and South American ports. Although nominally incorporated in Liberia, Incres manages its cruise business

in New York in its own name and jointly with a controlled New York corporation—Incres Lines Agency, Inc. (hereinafter called "Incres Agency") (R. 11, 397-8, 409).

Respondent (defendant below) International Maritime Workers Union (hereinafter called "IMWU") is an American labor union formed to organize merchant seamen employed aboard "runaway" or "flag-of-convenience" ships, i.e., foreign-flag vessels owned by absentee interests unconnected with the flag nation (R. 285, 290-1, 295-7, 397-8, 409-10; Defs. Ex. E—Preamble, Article II).

Defendant Shannon J. Wall is the Executive Director of IMWU (R. 284). The other defendants have not been served and do not appear.

Pleadings.

Complaint.

The complaint alleges that Incres' principal office is in Monrovia, Liberia (R. 28); and its two vessels, SS. *Nassau* and M/S. *Victoria*, are manned by Italian seamen belonging to an Italian labor union which has "approved" the employment contract (R. 12).[1]

The complaint further alleges that on May 13, 1960, IMWU began to picket the vessel with signs demanding recognition (R. 13). Crew members stopped working "some in the hope of higher wages . . . others in fear of reprisal," and longshoremen stopped loading (R. 13).

By way of legal conclusion, IMWU's actions are claimed to be unlawful because, *inter alia*, the union:

> (a) Seeks to compel recognition although it "does not lawfully represent a majority of the crew," and Incres is the "innocent victim of a jurisdictional dispute between rival unions" (R. 14-15).

---

[1] The record discloses that Incres seamen are not members of an Italian labor union (243).

(b) Cannot be certified as bargaining agent "by either the National Labor Relations Board or the New York State Labor Relations Board" because neither state nor federal labor relations statutes "apply to foreign ships with foreign crews in any way" (R. 15-16).

(c) Is interfering with the "internal management and relations of a foreign vessel" (R. 15).

Amended Answer.

The amended answer denies material allegations of the complaint, although it admits that IMWU picketed and a majority of the crew members voluntarily struck (R. 42-3).

The first affirmative defense alleges that the National Labor Relations Board has exclusive jurisdiction of the subject of the action.[2]

Petitioner's Operations.

Incorporated and registered under the laws of Liberia and having a nominal office in London, England, petitioner's vessels have never touched the shores of either country (R. 105, 119). Both vessels, except for an annual voyage to Genoa, are regularly engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of complaint, R. 11, 119). All such voyages originate and terminate in New York (R. 194-5, 233); each vessel completing approximately thirty such voyages in a cruise season (R. 119). Realistically, the vessels are floating hotels for American vacationists from the New York area and are regularly engaged in American commerce.

---

[2] For the purpose of this petition the remaining four affirmative defenses are not material to the issue before this Court.

Petitioner's business is conducted as a single integrated operation with its namesake and *alter ego*, Incres Agency, a New York corporation which it controls (R. 398, 409).

Both companies use a common letterhead under the heading "Incres Line" (R. 364, 367, 1099). Vincenzo Berlingeri, Incres' President and member of its Board of Directors (R. 114), resides in New York (R. 113) and maintains his office at 39 Broadway, from which he transacts petitioner's business (R. 105-6). He is also an officer and director of Incres Agency (R. 114).

From their common offices at 39 Broadway, Berlingeri and employees of Incres or Incres Agency handle or oversee the vital matters of passenger bookings (R. 106), provisioning (R. 106, 109, 326), arrangements for arrivals and departures, inspections, fueling, advertising, repairs, cargo and other husbandry details (R. 106, 107, 109-112, 251, 255).

Labor relations matters are similarly dealt with from 39 Broadway, including discipline, personal problems of crew members and such items as requests for promotions (R. 106, 119-20, 248-9).

The management and control of its operations from New York are only one aspect of Incres' significant American contacts. Another is its financing. The trial disclosed that a fleet mortgage for $4,000,000 covering the *Nassau* and *Victoria* is held by the Bank of America (R. 101). The mortgage confirms the intimacy of the relationship between Incres and Incres Agency. Among other things, the Agency undertakes to act as guarantor for repayment of principal and interest; the signature page indicates that the person who then executed the Loan and Credit Agreement as President of Incres Agency was one R. F. Barnett, the same person who executed the mortgage for Incres. A recorded amendment to the mortgage, dated

September 11, 1959, shows it to have been executed by Berlingeri, as Vice-President of Incres and President of Incres Agency. (Although not referred to in the record these documents are on file in the office of the Deputy Commissioner of Maritime Affairs of the Republic of Liberia for the Port of New York.)

Corporate semantics aside, the foregoing facts lead to the inescapable conclusion that Incres and its Agency, cemented together by interlocking officers and directors (R. 114) conduct a single integrated operation in which the activities of one are indistinguishable from the activities of the other.

IMWU Organizational and Picketing Activities.

IMWU began to organize the crews of the *Nassau* and *Victoria* in February 1960 (R. 299). Within two months its organizers succeeded in obtaining pledge cards from a majority of the crew members (R. 299-300). Thereafter, representatives of the Company and the Union entered upon discussions relating to the Union's demand for recognition and a collective bargaining agreement (R. 31-33, 302-4, 306).

When it became apparent that Incres would not voluntarily recognize IMWU, the Union picketed the *Nassau* on May 13, 1960, and the *Victoria* on May 15, 1960 (R. 33-34).

This action was instituted on May 16, 1960, when Incres obtained an *ex parte* temporary restraining order which enjoined the Union from picketing its vessels or urging or encouraging crew members not to work on the vessels (R. 8-9). On the same day IMWU filed unfair labor practice charges against Incres, which are still being processed by the National Labor Relations Board (R. 39-301).

Argument.

1.

On April 24, 1961, this Court denied certiorari in *Navios Corporation* v. *National Maritime Union*, 402 Pa. 325 (1960), 81 S. Ct. 1047. A subsequent petition for reargument was denied on May 29, 1961, 81 S. Ct. 1658.

Although differently phrased, the questions framed by petitioner in the instant case are substantially identical to those presented in *Navios*.

In *Navios* as here, petitioner bottomed its argument for the granting of certiorari upon the primary ground that the holding of the Pennsylvania Supreme Court was in irreconcilable conflict with *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957). We respectfully submit that *Benz* is clearly distinguishable. As every authority has recognized, the key to this Court's holding in that case was that the vessel was only "transiently" r "temporarily" in American commerce:

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing" (353 U. S. 138, 142).

In *Navios* the Pennsylvania Supreme Court quoted this language in italics (402 Pa. at p. 333).

In *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this court underscored the same limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947, 29 U. S. C. A. §141 et seq. governed the internal labor relations of a foreign ship and its foreign workers under

> contracts made abroad while that ship happened temporarily to be in American waters."

In *West India Fruit Co.*, 130 NLRB No. 46, 47 LRRM 1269 (1961), the NLRB stated that as it read *Benz*. this Court:

> "'. . . summarily dismissed commerce as a possible basis for jurisdiction because, as it emphasized, the ship was 'transiently' or 'temporarily' in American waters when the dispute arose."

Incres is cognizant of the critical significance in the *Benz* holding of the "transient" or "temporary" connection with American commerce. For this reason it is necessarily forced to take the position that its connection with American commerce is "temporary" and that the labor dispute involved here erupted while its vessels "were temporarily in United States ports" (Petition, p. 3).

If there ever was a steamship line with a "substantial continuing connection with American commerce" it is Incres. Elsewhere in its Petition (p. 4) this is candidly acknowledged. Incres' entire business is entirely in American commerce. Without its American patrons engaging for its cruises from New York, it would have no business. For Incres to claim that this connection is "temporary" and that the labor dispute in this case erupted while its vessels were transiently in an American port is simply an abuse of the concept of "temporary" or "transiently" as used in *Benz*. There is nothing happenstance about Incres' presence in the port of New York. The NLRB treated fully with *Benz* in *West India* (*supra*) and what it said in finding *Benz* inapplicable to the shipping operation involved there applies with equal force here, including the following:

> "In *Benz* to be sure, the Court was concerned with submitting a ship at each harbor to a new bargaining relationship if a mere 'temporary' contact with American waters were enough to support jurisdiction in labor matters. But where as here the vessel regularly and frequently sails from our harbors application of the Act would, if anything, tend to stabilize the bargaining relationship as it has in its other domestic applications" (47 LRRM at 1278).

On February 16, 1961 the Board, having asserted jurisdiction over foreign-flag shipping in *West India Fruit and SS Co., supra,* determined that the company had committed certain unfair labor practices and issued the usual order in the circumstances there obtaining.

Like the *Nassau* and *Victoria*, the ocean-going vessel in *West India* (the *Sea Level*), was of Liberian registry and was manned by alien seamen, none of whom was a United States resident. Also like the *Nassau* and *Victoria*, the *Sea Level* had never touched Liberian waters, although its crew signed Liberian articles and its officers were licensed by Liberia. Again, like the *Nassau* and *Victoria*, the *Sea Level*, "operated . . . as a common carrier in international and foreign commerce," made weekly trips between a port in the United States and a foreign country (i.e., Belle Chasse, Louisiana and Havana, Cuba).

West India is presently pending before the United States Court of Appeals for the 5th Circuit (No. 18929) on the company's petition for review and the Board's cross-petition for enforcement of its order. The sole issue before the Court is whether or not the Labor-Management Relations Act, as amended, is applicable to foreign flag vessels engaged in American commerce.

On July 10, 1961 the Board asserted jurisdiction over unfair labor practices committed on a foreign-flag vessel manned predominantly by non-resident aliens and beneficially owned by American interests. *Peninsular & Occidental Steamship Company, supra.* As petitioner notes this decision is also reviewable by the Federal Courts (p. 16 of petition).

In its most recent decision on the subject of foreign-flag vessels the Board directed an election for the unlicensed seamen employed aboard the SS. *Yarmouth,* a vessel owned by McCormick Shipping Corp., a Panamanian corporation. The *Yarmouth* flies the Panamanian flag and is operated primarily as a passenger cruise ship between Miami, Florida and Caribbean ports. Significantly, 95% of McCormick stock is held by persons who are neither citizens nor residents of the United States. The only material factual difference between Eastern and Incres is the location of the American port city where their respective cruises originate.

Since the General Counsel of the Board is presently considering the merits of the unfair labor practice charges filed by IMWU against Incres, it would appear on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation* (*supra*) that the administrative processes of the Board must be fully exhausted before this Court intervenes.

Moreover, we respectfully submit that if this Court is inclined to review the question of NLRB jurisdiction over foreign-flag vessels it should do so when the Board appears as a party. As we have previously indicated *West India* is now pending before the United States Court of Appeals for the 5th Circuit.

Conclusion.

For the foregoing reasons we urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 469

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York (R. 285 to 295), dated and filed July 7, 1961, is reported at 10 N. Y. 2d 218. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 265 to 282), dated and filed July 6, 1960, is reported at 11 App. Div. 2d 177, 202 N. Y. S. 2d 692. The oral decision *per* Justice Greenberg, in the Su-

preme Court of the State of New York, New York County granting a permanent injunction (R. 250 to 256), dated and filed May 25, 1960, has not been officially reported. The oral decision *per* Justice Greenberg denying defendants' cross motion to dismiss the complaint (R. 70 to 72), dated and filed May 19, 1960, has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on July 7, 1961 (R. 296). The petition for a writ of certiorari was filed October 3, 1961 and was granted (R. 300) December 4, 1961. The jurisdiction of this court is invoked under 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

1. Whether the state court erred in applying the rule enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that "when an activity is arguably subject to §7 or §8 of the Act [The Labor Management Relations Act, as amended] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . ." (*id.* at 245), where the issue here is a question of law, on facts not in dispute, as to whether the Act applies at all to foreign owned, foreign registered vessels flying foreign flags, manned by foreign crews serving under foreign articles entered abroad, the ships having come temporarily into American waters?

2. Whether the reach of the Labor Management Relations Act, as amended, extends to foreign owned, foreign

registered ships flying foreign flags and their foreign seamen working under foreign seamen's articles entered abroad, the ships having come temporarily into American waters; and whether the Act thus deprives state courts of jurisdiction over an action in tort seeking injunctive relief and damages against an American seamen's union from picketing or urging or inducing crew members to desert and to refuse to perform their duties in violation of their seamen's articles and the orders of the Master?

STATUTE AND TREATY INVOLVED

Petitioner contends that the jurisdictional scope of the Labor Management Relations Act (Taft-Hartley Act),[1] as amended (hereinafter referred to as "LMRA" and cited to the United States Code only), does not extend to the foreign ships here involved. The answer to this question cannot be resolved by reference to any particular section of the Act. To illustrate this, 29 U. S. C. §§141, 151 and 152(2), (3), (5), (6), (7) and (9) are reprinted in Appendix A, *infra*, pp. 49 to 53.

Reprinted in Appendix A, *infra*, p. 49, is Article XV of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

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[1] 61 Stat. 137 (1947), 29 U. S. C. §§141-187, (1958), amending the National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 519 (1959).

STATEMENT

The Parties

Petitioner (plaintiff below), Ineres Steamship Company, Ltd. (hereinafter called "Ineres"), is a Liberian corporation (Par. 1 of Complaint, R. 5; Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 38, 41-42), owned by Italian nationals residing in Italy, with its principal office in London (R. 51). Its president is an Italian citizen, Vincenzo Berlingeri (R. 51), who does not own any of its stock (R. 52). Ineres owns and operates the ocean going passenger cruise vessels, SS NASSAU and MV VICTORIA (Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 51; Wolfson Affid., R. 12, 13).

Respondent (defendant below), the International Maritime Workers Union (hereinafter called "IMWU"), is an American labor organization (Par. 12 of the Amended Answer, R. 30-31; R. 205) formed in November, 1959 (R. 190) by two American maritime unions—National Maritime Union and Seafarers International Union (R. 190)—for the "stated objectives" of organizing and representing alien seamen working on foreign flag vessels (R. 198-199). Respondent (defendant below), Shannon J. Wall, is both principal officer of IMWU and an officer of the National Maritime Union (R. 190-191). None of the other defendants were served, nor did any make an appearance.

The Foreign Vessels and Crews

Both vessels are registered under the laws of Liberia and fly the Liberian flag (Par. 6 of Complaint, R. 6-7; Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 39, 40, 51, 63). The vessels have Monrovia, Liberia as their registered home

port (Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39).[2] Neither has ever been under the American flag (R. 38-40). The vessels are inspected by the Liberian Government for compliance with the International Convention For Safety Of Life At Sea (R. 50). The Liberian Government does not restrict the trade of these vessels except that trade with communist countries is forbidden (R. 42). The officers of the ships are required to be licensed by Liberia, and the ships are issued Liberian radio station licenses (R. 37, 51).

The vessels are foreign owned and foreign controlled (Opinion of Sup. Ct., R. 251). The vessels are at present engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of Complaint, R. 6; R. 64). However, not all cruises originate in a United States port (R. 120). Cruises are made each year to Italy (R. 64) where the vessels undergo repairs and the crews take their leaves (R. 67). Occasionally, around the world cruises are made (R. 42).

The crews of the vessels are non-resident aliens, almost all of whom are Italian (Par. 8 of Complaint, R. 7; R. 60, 63-64, 105). They are recruited and hired in Genoa (R. 55-56, 105) under a wage agreement for the duration of the voyage and the season (R. 56). They sign Liberian articles in Genoa (R. 56, 118) in the presence of a Liberian consul (Df. Ex. C, R. 245, 116; R. 118, 185). The articles provide, *inter alia*, that "the terms of employment of the Master and the rest of the crew are governed by the laws of the Republic of Liberia . . ." and also that crew members ". . . shall

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[2] The Appellate Division found that Genoa, Italy, was the "de facto" home port of the two vessels (R. 269). Petitioner accepts this finding.

be ready to sail for any voyage and any destination whatsoever, at any time, whenever they shall receive orders to such effect from the Master of the ship or whomsoever replaces him" (Df. Ex. C, R. 245, 116). The articles incorporate by reference a more detailed underlying contract governing wages, terms and conditions of employment (Pl. Ex. 4 [not printed in the Record], R. 185; R. 56, 156-7, 185). Provisions in this contract obligate each crew member, *inter alia*, to obey the orders of his superior, to return to the ship not later than two hours before sailing and to give notice of intention to terminate his employment at least 48 hours before arrival or departure of the vessel in port (R. 186-187).

Union Activities

Wall testified that a factor in the course of action taken against Incres was the IMWU's belief that the operation of the NASSAU and VICTORIA deprived American seamen of job opportunities (R. 194, 201). Wall testified that if Incres were out of business, then American companies would probably have two more vessels operating on the route served by Incres (R. 217, 218). In other words, it would be to the advantage of IMWU, if Incres were out of business and if there were no other ships but American ships (R. 218).

In February 1960, IMWU initiated a campaign to organize crew members of the NASSAU and VICTORIA (R. 201).

On May 13, 1960, shortly after docking at pier 42, North River, New York City, the NASSAU—scheduled to depart on another cruise that same day—was met by an IMWU picket line (R. 141, 142, 158-159; Df. Exs. D and D-1 [not printed

in Record], R. 159). As a result of this picketing, longshoremen refused to load baggage, cargo and provisions on the NASSAU (Par. 12 of Complaint, R. 8; Wolfson Affid., R. 14; R. 142, 143, 144). Moreover, some crew members on the NASSAU, at the instigation of IMWU representatives on the dock, thereupon refused to obey orders to perform certain duties (Vagliasindi Affid., R. 16, 17; R. 141, 143, 177).

Later that same day, IMWU representatives from positions on the dock and on board the vessel caused about 100 crew members, without permission and in disobedience of their seamen's articles, to walk off the NASSAU approximately one hour before the vessel's scheduled departure (Pars. 11 and 13 of Complaint, R. 8; Wolfson Affid., R. 14; R. 142). These crew members refused to obey the order of the Captain that they return to the ship (Vagliasindi Affid., R. 17; R. 145). The NASSAU was left helpless and immobile at its berth, making it necessary to cancel the scheduled voyage (Pars. 15 and 22 of Complaint, R. 8-9, 10; Wolfson Affid., R. 14; Vagliasindi Affid., R. 17; R. 146, 147, 170).

Two days later, on May 15, the IMWU took direct action against petitioner's other vessel, the VICTORIA, returning from a cruise to South America (R. 93, 94). That day, pier 42, where the VICTORIA had been scheduled to dock (R. 93, 173), was occupied by the NASSAU, then still unable to sail (R. 173). Since other docking facilities could not be obtained for the VICTORIA (R. 173), it was necessary to disembark its passengers by tug boats while the vessel lay at anchor in New York Harbor (R. 93). As passengers were being brought ashore, IMWU representatives in a small launch marked "UMD-2" approached and boarded the tug boats

(R. 93, 94). Immediately thereafter the tug boats ceased disembarking passengers and left the vicinity of the vessel (R. 94-95, 105-106). Later that same day, following the intervention of police officials, the tug boats resumed operations (R. 95).

The next day, May 16, the IMWU was served with a temporary restraining order which enjoined the union from picketing petitioner's vessels or urging or encouraging crew members not to work on those vessels (R. 4-5). On the following day, May 17, early in the afternoon, passengers were being embarked by means of launches on the VICTORIA, which remained at anchor (R. 96). The vessel, scheduled to sail later that day (R. 96), was again approached by the launch UMD-2 (R. 74). Then, despite the restraining order, as the UMD-2 hovered near the vessel, IMWU representatives on board the launch urged the crew with a loudspeaker (R. 74, 136) not to sail (R. 74, 75, 86-87, 96, 97, 106-108). At the time, union representatives told crew members to feign illness and demand medical assistance as a means to prevent the ship from sailing (R. 75-76, 96-97, 107-108). This activity continued for approximately 40 minutes (R. 137).

A few hours later, when all of the pasesngers were on board and the VICTORIA was ready to sail as scheduled (R. 98), the members of the engine room department refused to run the engines (R. 98-99, 100-102, 125-126, 128). Representatives of the crew informed the Captain that they wished to confer with "the Union" (R. 102, 126). Because of this refusal, the ship could not sail (R. 98, 128).

On the following day, the Captain of the VICTORIA permitted representatives of the crew to go ashore and meet

with IMWU representatives (R. 102). Following this meeting, the crew members on shore contacted by radio telephone crew members remaining on the vessel and confirmed that the VICTORIA was not to sail (R. 103-104, 128). Thereupon the cruise was canceled and the passengers disembarked (R. 104).

As a result of the picketing and other acts of interference by the IMWU, neither the NASSAU nor the VICTORIA was able to resume its normal operations until after the decision of the Supreme Court of New York (R. 250-256) granting a permanent injunction against the picketing and other acts of interference.

Incres Line Agency, Inc. and Cosmopolitan Shipping Corporation

Incres employs the services of Incres Line Agency, Inc., a New York corporation with offices at 39 Broadway, as an agent to take care of the booking and arrival and departure arrangements of passengers in the United States (R. 52, 53, 55).[3] It provides the usual services of a steamship agency (R. 52, 55). Incres Line Agency, Inc. accounts to Incres for the sale of passenger tickets (R. 56) and takes care of the necessary provisioning of the ships in the United States (R. 55). Wolfson, president of the agency, may authorize repairs either after discussion with the president of Incres or occasionally with someone else (R. 57). Aside from the agency agreement itself (produced at the trial but not put in evidence, see Fols. 487-489 of original Record on Appeal [not reprinted]), the only connection between Incres and the New York agency is that the president of

[3] It also employs H. Curley & Fink as an agent with similar responsibilities in Nassau, British West Indies (R. 52, 53, 57).

Incres, Berlingeri, is also an unpaid officer and director of Incres Line Agency, Inc. (R. 59). He resides part of the time in New York and is provided office space at Incres Line Agency, Inc., 39 Broadway, when he is present in New York (R. 52, 57).

When in New York, Berlingeri visits the ships and checks on their general condition (R. 53), and he may authorize repairs (R. 57). He may discuss with the crews their personal or family problems, but his discussions do not include such matters as promotion or demotion (R. 53). Although it is not the rule of the company that the captains report to Berlingeri, they might on occasion do so with respect to incidents occurring on board ship (R. 54). He sometimes contacts the ships' husband in New York, Cosmopolitan Shipping Co. (R. 175). He is generally concerned with the operation of the ships when in New York, but testified that it is incorrect to say that the operations of the two vessels are conducted under his supervision from the office at 39 Broadway, because the agency there is primarily concerned with the arrival, departure and booking of passengers and with provisions (R. 52, 53).

Because Incres gives business to Incres Line Agency, Inc., Berlingeri is in a limited sense Wolfson's superior, and may on occasion give him directions (R. 57, 58).

Cosmopolitan Shipping Corporation with offices at 42 Broadway, New York City (R. 61) acts as ships' husband when the ships come into New York (R. 172), takes care of fueling (R. 58), loading, docking and disembarkation of passengers and hires linesmen, tugboats, and pilots (R. 172, 175). Cosmopolitan was engaged by Incres Line

Agency, Inc. on behalf of Incres to provide the above services for the NASSAU and VICTORIA (R. 172). Cosmopolitan provides these services for other steamship lines as well as Incres (R. 172).

The Litigation

Incres commenced the present tort action for damages and injunctive relief in the Supreme Court of the State of New York, New York County, on May 16, 1960, by service on that date of a summons and complaint, a temporary restraining order and an order to show cause why a permanent injunction against defendants' activities should not issue, signed by Justice Greenberg. A hearing pursuant to said order to show cause commenced May 18, 1960.[4] The hearing continued over a four day period. The order and judgment of the Supreme Court of New York (Greenberg, J.) denied defendants' motion to dismiss the complaint, permanently enjoined defendants, and severed plaintiff's damage claim for trial in regular course. Defendants appealed to the Appellate Division, First Department, which by a three to two decision modified and affirmed the order and judgment below. Defendants appealed, and by a four to three decision the Court of Appeals reversed the order and judgment of the Appellate Division and dismissed the complaint.

The petition for a writ of certiorari was filed October 3, 1961 and was granted December 4, 1961.

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[4] During the course of the hearing counsel for the parties stipulated that the hearing be treated as a hearing for a permanent injunction.

SUMMARY OF ARGUMENT

The state court erred in applying the "arguably subject" pre-emption rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959) and deciding that "at least until the board refuses jurisdiction the State courts have none." (R. 291). The issue here is wholly different from that in *Garmon*. Here the threshold question to be determined is the very scope and reach of the LMRA as a whole, *i.e.*, whether it applies at all to a foreign employer and his foreign employees on foreign flag ships. In *Garmon* the issue was, as between an American employer and an American union, whether particular activity was either protected or prohibited by Section 7 or Section 8 of the Act—an issue which necessarily assumes jurisdiction over the subject matter of the dispute. In *Garmon* this Court was concerned that a multiplicity of state court decisions might frustrate national policy as expressed in the Act unless the NLRB were given exclusive primary competence. It was concerned with federal-state relations. Here, on the contrary, the concern is with the projection of our federal labor law into matters that concern our relations with other sovereign nations. Finally, the issue of law here does not involve any question calling for the special competence in domestic labor matters of the NLRB. On the contrary, it involves only questions of statutory construction in accordance with applicable treaty and international maritime law.

The underlying jurisdictional question was decided by this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) in holding that the LMRA was not applicable to a foreign ship and its foreign crew. Such a decision would not have been rendered if the *Garmon* rule were

applicable and the jurisdictional question was for the exclusive primary competence of the NLRB, as was, in fact, urged by Mr. Justice Douglas in his dissenting opinion in *Benz*.

Petitioner submits that the *Benz* decision is controlling in the instant case. The construction of the LMRA in *Benz* reflects the legislative history which describes the Act as applying to American employers and American employees. The *Benz* decision construes the Act in harmony with the express language of the Maritime Labor Act, 52 Stat. 965 (1938) which was specifically inapplicable to foreign flag vessels. It is in accord with the established canon of construction that a statute should never be construed to apply extraterritorially absent the clearly expressed intent of Congress. See, *e.g.*, *Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281 (1949). It is in accord with the venerable canon of construction that a statute should never be construed to violate the law of nations if any other possible construction exists. See, *e.g.*, *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804).

Under Article XV of the Treaty with Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939), as well as under undoubted international maritime law, the nationality of a vessel is determined by its flag. Furthermore, under principles of comity and international law long accepted by the United States, the law of the flag country governs exclusively (with certain exceptions not here relevant) the internal affairs of a ship. See, *e.g.*, *Wildenhus's Case*, 120 U. S. 1 (1887); *United States* v. *Flores*, 289 U. S. 137 (1933).

For the United States to project American labor laws on board foreign vessels to regulate their internal affairs including employment relationships, would cause resentment over what would be considered by the flag state to be an infringement of its sovereignty and invite retaliation by foreign nations. It would at least be an invitation for foreign nations to assert their laws over the internal affairs of American flag ships. Similarly, to establish a test, as suggested by the state court, of weighing the contacts of foreign vessels with the United States to determine whether the LMRA should apply to govern labor relations would, in addition to being impractical and unsupported by authority, invite a multiplicity of conflicting decisions by soveregn nations—each nation weighing the contacts of a particular ship with itself. The obvious confusion and resentment which would result itself sounds the warning against following such a course. As succinctly stated by this Court in *Benz*:

> "... for us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." 353 U. S. at 147.

I. The Court of Appeals of the State of New York Erred in Applying the Rule of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959) to Deprive the State Court of Jurisdiction in the Instant Case.

The state court concluded that:

> "... it is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should therefore hold ... that at least until the board refuses jurisdiction the State courts have none." (R. 291)

The Court relied upon the rule of the *Garmon* decision, *supra*, that:

> "... When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. at 245

It may be, as the court below suggested, that it is "arguable" that the Board itself would attempt to exercise jurisdiction in the dispute as to which the injunction was issued. But this is not the *Garmon* test. Under *Garmon* the question to be decided is whether, as a matter of law, the particular activities involved clearly are not or "arguably" are protected or prohibited under the Act. We show in Point II below that, under controlling decisions by this Court, the Act itself clearly does not extend to the subject matter of the controversy now before this Court. Thus, the second issue, which was dealt with in *Garmon*, as to whether particular sections of the LMRA protect or prohibit specific activity is never reached in the case at bar.

The application of the *Garmon* rule in this case to the basic issue of jurisdiction over the subject matter was, we submit, erroneous.

The *Garmon* case involved a dispute between American unions and an American employer in the business of selling lumber in California. The unions had sought an agreement with the employer to retain in his employ only workers who were already union members or who applied for membership in thirty days. The employer refused, claiming that none of the employees wanted to join the union, and that in any event he could not accept such an arrangement until one of the unions had been designated as collective bargaining agent. The union then began to picket for the purpose of compelling execution of the proposed contract.

The *Garmon* case did not involve a basic jurisdictional determination. The issue was whether or not particular activity of an American union against an American employer, both obviously within the jurisdictional scope of the LMRA, was either protected or prohibited under Sections 7 or 8 thereof. The underlying question here, on the other hand, requires not a determination of whether a particular activity falls within the protection or prohibition of a particular section of the LMRA, but rather the threshold determination as to the very scope and reach of the LMRA as a whole, *i.e.*, whether Congress intended it to apply to foreign ships at al. The employer-employee relationship is between a foreign employer and his foreign employees.

In *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), although Mr. Justice Douglas urged in his dissenting opinion that state law had been pre-empted by federal law and that "American unions should be subject

only to disciplinary action by the federal agencies to whom Congress has entrusted the job of law enforcement," 353 U. S. at 149, this Court reached and decided the question of whether the jurisdictional reach of the LMRA extends to foreign ships and their foreign crews without invoking or even discussing application of the *Garmon* rule as it had been developed up to that time in *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955) and other decisions. The *Benz* case involved review of the decision of a federal court sitting in diversity and applying state law to permit recovery of damages resulting from picketing of a foreign flag ship in an American port. That decision could not have been rendered if the pre-emption rule were applicable, for this Court would then have had to refer the controversy to the exclusive primary competence of the NLRB. This was the view urged in the dissenting opinion of Mr. Justice Douglas.

The "arguably subject" rule of *Garmon* is no more applicable to the issue in this case than it was to that in the *Benz* case.

In *Garmon* this Court weighed heavily the possibility that a multiplicity of conflicting state court decisions might interfere with and frustrate national policy as expressed in the LMRA. It was concerned with federal-state relations—the extent to which state regulation must yield to federal authority where there is the potential that state power will interfere with the "clearly indicated [federal] policy of industrial relations," 359 U. S. at 243. No such problems are raised here. Here the concern is with the projection of the LMRA into an area involving infringement of the sovereignty of foreign nations. Here too, as in the *Benz*

case, the question is raised, which did not exist in the *Garmon* decision, of whether there is any expressed Congressional policy that the LMRA should apply at all to foreign ships and their foreign crews. The question in this case is one of law, on jurisdictional facts not in dispute, as to whether the LMRA applies at all to foreign owned foreign registered ships flying foreign flags and their foreign crews serving under foreign articles entered abroad under foreign law, the ships having come temporarily into American waters.

No more than in the *Benz* case, does the issue here involve any question that calls for the expertise of the NLRB. On the contrary, as we develop in our argument below, the attempt in this case to project federal labor law and the NLRB into international matters calls for construction of the Act in accordance with the intent of Congress, applicable canons of construction, the treaty with the Republic of Liberia, the law of the flag and the jurisdiction of the flag country over the internal order of a vessel under international law, comity and the forbearance that should be observed between friendly foreign nations in maritime matters, and other points of law wholly unrelated to any expertise accorded to the NLRB.

As observed in the dissenting opinion in the Court of Appeals of the State of New York:

> "... This is clearly not a *Garmon* ... type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity under the Act. If there is 'arguability' here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. ..."

> But courts, neither state nor federal, need step aside to permit the National Labor Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern." (R. 294, 295)

Moreover, it is unthinkable that Congress would have intended the courts to "step aside" from the determination of the very sensitive questions of law involving the applicability of the LMRA to foreign ships and the relief available to such ships from interference by American unions while the Board exhausted its procedures. The Board may refuse to assert or deny its jurisdiction. It may, as in the instant case, do nothing for almost two years.[5] It is hard to believe that the courts must suspend their judicial function over the far reaching and sensitive jurisdictional questions here involved to permit the Board to proceed or not as it may see fit. That is not the recognized relation between courts and administrative agencies, as we understand it.

A decision by this Court that Congress has not declared any national policy for the application of the LMRA to foreign vessels will leave state courts free to apply whatever state laws may be applicable to whatever controversy may arise. In the instant case, the lower state courts, until reversed by a decision of a majority of the Court of Appeals, applied state law and granted injunctive relief against the tortious activities of the defendants. If for any reason any undesirable diversity of local law should result, it is for the Congress to determine what, if any, remedy should be provided as a matter of national policy.

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[5] A charge was filed with the NLRB by respondent IMWU against petitioner and has been pending since May 13, 1960 without any action by the Office of the General Counsel (Df. Ex. A, R. 27).

II. The Labor Management Relations Act, as Amended, Does Not Apply to Regulate Labor Relations on Foreign Flag Ships.

The state court in holding that it was "arguable" that the NLRB would exercise jurisdiction and that therefore, under the *Garmon* decision, at least until the NLRB refused jurisdiction the state courts had none, did not reach the fundamental question of law as to whether the LMRA applies at all to the situation presented on the record in this case. If we are right in our contention that this was error, then the federal question of the construction of the LMRA is squarely presented, because the jurisdiction of the state court over the subject of the action is necessarily dependent upon the decision of this Court on that federal question.

It is petitioner's contention that the LMRA has no application here.

A. Application of the LMRA as a Whole Must Be Considered in This Case

Respondents seek the protection of Section 7 of the LMRA, 29 U. S. C. §157, in their efforts to organize the unlicensed seamen on the NASSAU and VICTORIA, to be recognized as the collective bargaining representative of these seamen and to bargain with the foreign employer concerning terms and conditions of employment on board these two ships. They have also invoked Section 8(a)(5) of the LMRA, 29 U. S. C. §158(a)(5) against Ineres (Df. Ex. A, R. 27: charge filed by respondent IMWU against petitioner with NLRB dated May 13, 1960). They further have contended that the allegations in petitioner's complaint charge

violations of various of the subsections of Section 8(b) of the LMRA, 29 U. S. C. §158(b).

Respondents, in effect, invoke the full scope of the LMRA, for if Sections 7 and 8 are found to be applicable it must necessarily follow that the election provisions of Section 9, 29 U. S. C. §159, the procedural and remedial provisions of Section 10, 29 U. S. C. §160, and the other interrelated provisions must likewise be applicable. The Act is "a complex and interrelated federal scheme of law, remedy, and administration," as this Court observed in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959).

The LMRA is not susceptible of dismemberment and treatment as a series of unrelated enactments because all of its provisions are directed to the attainment of its basic objectives. These are stated in Section 1 of the National Labor Relations Act, as amended by the LMRA. It is there declared

> "... to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U. S. C. §151.

It is equally clear that neither petitioner nor respondents may invoke only selected provisions of the LMRA and thus exclude others. The LMRA must be read as a whole.

and the protections and prohibitions in it with respect to shoreside picketing, for example, are inseparable from the provisions relating to elections, and all of the regulations of the rights and duties of both sides in collective bargaining, which necessarily relate directly to the internal order of a ship.

The LMRA was treated as a whole in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) and should be so treated here.

B. The Language of the LMRA: Its Construction in the *Benz* Decision Is Controlling Here

The language of the LMRA defines the words "employer", "employee", "labor organization", "commerce", "affecting commerce" and "labor dispute" with literal universality, 29 U. S. C. §§152 (2), (3), (5), (6), (7) and (9). It contains no express words of exclusion that are relevant here. This Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), in dealing with the same Act held, without deeming it necessary to discuss the point, that this same universal language required construction and proceeded to determine the "intent of the Congress as to the coverage of the Act." *Id.* at 142.

The language of the LMRA was similarly found to require construction in *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 at 25,889, 25,890 (2nd Cir. Jan. 12, 1962), and *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 at 25,945, 25,946 (D. D. C. Jan. 18, 1962).

We submit that the decision in the *Benz* case is controlling here. This Court held, after reviewing the legislative

history of the LMRA, that "what was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 353 U. S. at 144. This holding precludes application of the LMRA to the foreign seamen on board petitioner's foreign ships.

The facts in the present case fit squarely within the holding of the *Benz* case in every essential particular. Both cases involve foreign flag vessels manned with alien crews serving under foreign articles entered abroad. In both cases there was direct interference by American seamen's unions with the internal management and affairs of the vessels. In both cases defendants acted while the vessels were temporarily in United States ports.

Two recent decisions held that the LMRA did not apply to Honduran flag ships with foreign crews serving under foreign articles entered abroad. The vessels in these cases were owned by a Honduran corporation which was a wholly-owned subsidiary of the United Fruit Company. One case was brought in the District Court for the District of Columbia by a Honduran union seeking a preliminary injunction against the holding by the NLRB of a representation election aboard the ships. The Court, *per* Judge Holtzoff, granted the injunction, ruling that the LMRA was inapplicable to such vessels. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962). The other case involved the same facts except that the injunction was sought in the Southern District of New York by the Honduran corporate owner of the ships. The decision of the District Court denying the injunction was

reversed by the Second Circuit in an opinion by Judge Friendly on the ground that the LMRA did not apply to empower the NLRB to order an election on these foreign ships. *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962).

The foregoing construction of federal labor laws in no way limits their appropriate application in United States maritime matters. The intent of Congress that the LMRA should apply to American flag vessels wherever they may be and to their crewmen whatever their nationality is clear. This is all the proper concern of Congress in enacting labor legislation. But it is quite a different matter to attribute to Congress an intention to regulate labor relations on foreign ships in international trade. Such an attribution would fly in the face of the canon of construction stated in *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281 (1949) that:

> "*First.* The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States*, *supra*, at 437, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case." *Id.* at 285.
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> ". . . An intention so to regulate labor conditions which are the primary concern of a foreign country

should not be attributed to Congress in the absence of a clearly expressed purpose.". *Id.* at 286.

To apply the LMRA to shipboard labor relations on foreign flag ships would require that the Act be applied extraterritorially, because the regulatory scheme of Congress surely governs shipboard labor relations, if it governs them at all, at all times and places and wherever a ship may be. There is no problem on this point as to an American flag ship, but there is as to a foreign flag ship. It would be absurd to hold that the power of the NLRB springs into existence the moment a foreign flag ship enters the territorial waters of the United States and ceases the moment such a ship departs these waters. Such a result warns against a construction of the Act that would attribute such a purpose to Congress.

This territorial canon of construction is of long standing in our law. *The Appollon*, 22 U. S. (9 Wheat.) 362, 370-72 (1824); *Brown* v. *Duchesne*, 60 U. S. (19 How.) 183, 198 (1856); *Sandberg* v. *McDonald*, 248 U. S. 185, 195 (1918); *New York Cent. R. R.* v. *Chisholm*, 268 U. S. 29, 31 (1925); *Jackson* v. *S. S. "Archimedes,"* 275 U. S. 463, 467 (1928).

Moreover, this particular canon has been consistently applied in the construction of American labor legislation. *Foley Bros., Inc.* v. *Filardo*, *supra*, involved the Eight Hour Law; *Benz* v. *Compania Naviera Hidalgo, S. A.*, *supra*; *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 at 25,890 (2nd Cir. Jan. 12, 1962) and *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas.

¶17,392 at 25,945 (D. D. C. Jan. 18, 1962) all involved the LMRA; *New York Central R. R.* v. *Chisholm*, 268 U. S. 29, 31 (1925) involved the Federal Employers Liability Act; *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951) *cert. denied*, 342 U. S. 849 (1951) and *Air Line Stewards & Stewardesses Ass'n* v. *Northwest Airlines, Inc.*, 162 F. Supp. 684 (D. Minn. 1958), *aff'd*, 267 F. 2d 170 (8th Cir. 1959), *cert. denied*, 361 U. S. 901 (1959) both involved the Railway Labor Act.

The language of the LMRA itself, though literally universal in scope, is not helpful in determining its intended jurisdictional reach. Its legislative history, however, reveals that the Act was not intended to apply beyond the territorial limits of the United States. There is not even a hint in the legislative history that the LMRA was intended to apply to foreign employees working outside the territorial limits of the United States. Its history was considered at length by this Court in *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957), which summarized its findings as follows:

> "... The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those raised here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman

> Hartley, stated that 'the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) H. R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possession." *Id.* at 143-144.

It is clear that even Joseph Curran, then chairman of the CIO Maritime Committee, considered the LMRA as applicable only to "American workers", "American seamen" and the "American merchant marine" when he testified at the Congressional Hearings in 1947, when amendment to the National Labor Relations Act was being considered.[6]

Every reference relating to labor relations on ships in the legislative history of the Act refers to American vessels and American workers.

C. When Congress Has Legislated With Respect to Foreign Vessels Its Intention to Do So Has Been Clearly Expressed

It is noteworthy that when Congress has legislated with respect to foreign vessels it has indicated its intent that

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[6] Hearings on S. 55 and S. J. Res. 22, bills having the object of reducing industrial strife, before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 1396, 1398, 1399, 1405, 1411, 1413.

legislation apply to foreign vessels and alien seamen in clear and unmistakable language. Such legislation is found in areas recognized as appropriate and customary by maritime nations. Immigration laws are, of course, applied to all vessels.[7] Customs and certain food and drug provisions apply equally to domestic and foreign vessels.[8] And Congress has demonstrated a strong interest in maintaining standards of safety on all vessels navigating waters of the United States. Examples are the Steamboat Inspection Act,[9] the Dangerous Cargo Act,[10] the Load Lines for American Vessels Act,[11] the Passenger Act[12] and a miscellany of other statutes in the same area.[13]

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[7] See for example, 66 Stat. 219 (1953), 8 U. S. C. §1281 (1958); 66 Stat. 233 (1953), 8 U. S. C. §1357(a)(3) (1958); 66 Stat. 221 (1953), 8 U. S. C. §§1283-84 (1958); 66 Stat. 195-96, 198 (1953), 8 U. S. C. §§1221-22, 1225 (1958); 66 Stat. 201 (1953), 8 U. S. C. §1227 (1958).

[8] See for example, 46 Stat. 708 (1931), as amended, 19 U. S. C. §1401(a) (1958); 46 Stat. 710-11 (1931), as amended, 19 U. S. C. §§1431, 1433, 1435 (1958); 46 Stat. 716 (1931), 19 U. S. C. §1455 (1958); 46 Stat. 747, 749 (1931), as amended, 19 U. S. C. §§1581, 1588 (1958); 38 Stat. 277 (1915), as amended, 21 U. S. C. §184 (1958).

[9] Rev. Stat. §§4399-4401 (1875), as amended, 46 U. S. C. §§361-367 (1958).

[10] Rev. Stat. §4472 (1875), as amended, 46 U. S. C. §§170-170b (1958): *United States* v. *Giordani*, 163 Fed. 772 (S. D. N. Y. 1908).

[11] 45 Stat. 1492-94 (1929), as amended, 46 U. S. C. §§85-88d (1958).

[12] 22 Stat. 186 (1883), as amended, 46 U. S. C. §§151-163 (1958).

[13] Rev. Stat. §481 (1875), 46 U. S. C. §481 (1958); 41 Stat. 998 (1921), as amended, 46 U. S. C. §882 (1958); 53 Stat. 1049 (1939), as amended, 46 U. S. C. §224-a (1958).

This Court in its opinion in the *Benz* case, 353 U. S. at 144-145, gave two examples of legislation in which the intention of Congress to apply the legislation to foreign ships in our ports was clearly expressed: the Seamen's Act, of March 4, 1915, 38 Stat. 1164, which prohibits advances of seamen's wages on foreign vessels "while in waters of the United States," construed in *Sandberg* v. *McDonald*, 248 U. S. 185 (1918); and the 1920 amendment to Section 4 of the same Act, 41 Stat. 1006, 46 U. S. C. § 597 (1958); granting to every seaman—"on foreign vessels while in harbors of the United States" the right to demand one-half of his then earned wages, construed in *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348 (1920) and *Jackson* v. *S. S. "Archimedes,"* 275 U. S. 463 (1928).

In the sole instance in which Congress dealt with the particular problems of maritime labor relations, it denied application of the legislation—the Maritime Labor Act—to foreign flag vessels:

> "The provisions of this title shall not apply to the master or members of the crew on any vessel not documented, registered, licensed or enrolled under the laws of the United States."[14]

In this Act Congress unequivocally made the flag of the vessel the sole determining jurisdictional factor, regardless of participation in United States commerce, ownership, nationality of the crew, etc., despite the fact the Act itself is written in terms of "waterborne commerce."[15]

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[14] §1003, 52 Stat. 966 (1938).

[15] §1001, 52 Stat. 965 (1938).

There is a marked similarity between the stated policy of the Maritime Labor Act and the policy of the National Labor Relations Act as originally enacted.[16]

Both are phrased in terms of eliminating "the causes of certain substantial obstructions to the free flow of commerce," except that, as noted above, the Maritime Labor Act is written in terms of "water-borne commerce." Each Act employs the same phrase, "to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ." "Water-borne commerce" is defined in the Maritime Labor Act in broad terms, including "commerce by water between any State . . . and any foreign country," and "commerce by water on the high seas."[17]

The Maritime Labor Act was enacted in 1938.[18] The purpose of this legislation was to facilitate water-borne commerce by speedy, harmonious resolution of disputes between maritime employers and employees. Disputes embraced by the Act were those over wages, hours of employment, rules, working conditions, grievances, and interpretation of employment contracts. Specifically excluded from the ambit of the Act were unfair labor practices and questions of employee representation, reserved to the National Labor Relations Board under the National Labor Relations Act.

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[16] 49 Stat. 449, as amended, 29 U. S. C. §151 (1958).

[17] §1003, 52 Stat. 966 (1938).

[18] 52 Stat. 965 (1938), as amended, 55 Stat. 259 (1942). (This Act is no longer in effect).

The chairman of the Senate Committee expressed the concern of the legislators that the Maritime Labor Act and the National Labor Relations Act should be construed so as to be in harmony with one another:

> " 'It would be fairly inconsistent with any kind of labor policy, after we have a statute like the Labor Relations Act with regard to unfair labor practices, for us to enact anything which would be out of harmony with that statute.' "[19]

The fact that this legislation was enacted only three years after the National Labor Relations Act and was described as a supplement thereto[20] is indicative of legislative intent that the literally universal words of our general labor laws are to be construed, when sought to be applied in maritime labor matters, to apply to American flag vessels only.

Support for this construction is found in *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281 (1949). In that case, the Court refused to extend the coverage of the Eight Hour Act to employees of a government contractor working in Iran and Iraq. By its terms the Act, as amended in 1912,

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[19] Senator Thomas, Chairman of the Committee on Education and Labor, Hearings on S. 3078 before the Senate Committee on Commerce and the Senate Committee on Education and Labor, 75th Cong., 3d Sess., pt. 12 at 1181 (1938).

[20] Justice Douglas in a dissenting opinion, declared:

> "The Merchant Marine Act of 1936, . . . deals with maritime labor relations as a supplement to the National Labor Relations Act (see 46 U. S. C. §1252 [Maritime Labor Act]) . . ." *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 499 (1947) (dissenting opinion)

extended to "every contract" and thus on its face appeared to cover a contract abroad. However, this Court noted that a 1913 amendment to the Act was designed to extend to dredgers "in any river or harbor of the United States or of the District of Columbia" the same coverage accorded to "laborers and mechanics" under pre-existing law. This Court construed the 1913 amendment as a strong indication of Congressional intent to limit the entire Eight Hour Act to the territorial jurisdiction of the United States. This Court declared:

> ". . . In its attempt to secure equality of treatment for dredges on the one hand and laborers and mechanics on the other, Congress would hardly have intended for coverage over the latter class to extend to the far corners of the globe while coverage over the former was limited to work performed in rivers or harbors 'of the United States or of the District of Columbia.'" *Id.* at 287-88.

To paraphrase the language of this Court, it is hard to believe that a valid construction of these two acts of Congress would extend the National Labor Relations Act, as amended by the LMRA, to foreign flag vessels and restrict the Maritime Labor Act of 1938 to American flag vessels. Such a construction does violence to common sense and has no support in legislative history.

D. The State Court Erred in Suggesting That the Extent of the American Contacts of a Foreign Vessel Should Be the Test to Determine Applicability of the Act[21]

The state court, we submit, was in error in limiting the holding of this Court in the *Benz* decision to ships that "happened temporarily to be in American waters" (R. 288). The state court described petitioner's two ships as having "an American port as one of the two termini of its fixed, regular shuttle service" (R. 289) in contrast to the tramp ship in the *Benz* case.

We believe that the state court read the *Benz* opinion too narrowly. The fact is, of course, that great fleets of foreign vessels have, throughout our history as a great

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[21] The state court referred extensively (R. 287-291) to three NLRB cases: *West India Fruit and S.S. Co.*, 130 NLRB No. 46 (1961); *Eastern Shipping Corporation*, Case No. 12-RC-415, 44 LRRM 1571 (1959) and *Peninsular and Occidental S.S. Co.*, 120 NLRB No. 147 (1958). In the *West India* case, the Board laid down a test for determination of whether the LMRA was applicable to foreign flag shipping, namely, whether the "contacts between the operation of the *Sea Lord* [the foreign flag vessel] and the United States are substantial—that is more than minimal but not necessarily preponderant." (1961 CCH NLRB at 14,948) The Board has since *West India* applied the contacts test to all cases involving foreign ships brought before it and has in each case extended its jurisdiction over the ships involved. See *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 1 (1961), *Eastern Shipping Corp.*, 132 NLRB No. 72 (1961); *United Fruit Co.*, 134 NLRB No. 25 (Nov. 17, 1961). The *West India* and *Peninsular and Occidental* cases are pending on petitions for review before the 5th Circuit. The *United Fruit* decision was in effect reversed when the Board was enjoined in two separate decisions from conducting an election on the foreign flag ships involved. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962) and *Empresa Hondurena de Vapor, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962).

maritime nation, conducted a "regular shuttle service" of passenger and freight vessels across the North Atlantic and South Atlantic and other great trade routes. We submit that the import of the decision of this Court in the *Benz* case does not mean that federal labor law is applicable to foreign ships that regularly or frequently trade in United States ports.

We submit further that the state court erred for a number of reasons in suggesting that applicability of federal labor law is to be determined by the American contacts of the ship (R. 288, 289).[22] In a maritime matter a "contacts" rule carries with it, as we develop below, an inherent invitation to conflict between sovereign nations.

First, there is nothing in the language of the LMRA to suggest let alone declare any such test of "contacts". This Court applied no such test in the *Benz* decision. It stated the question presented there to be:

> "... whether the Labor Management Relations Act of 1947 applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." 353 U. S. at 138-139.

Second, any such construction of the LMRA would require that its limits be marked out on a case by case, ship by ship basis. It would require the courts to determine

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[22] See Comment, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing*, 69 YALE L. J. 498, esp. pp. 510, 511 (1960), cited with evident respect in *Marine Cooks and Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 372 (1960).

what "contacts" were relevant and then weigh them without any guidance whatsoever much less mandate from the Congress. This judicial task would run directly counter to the significant statement of this Court in the *Benz* decision:

> "... for us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the Courts." 353 U. S. at 147.

Third, there is no weighing of the "contacts" of an American flag ship when the jurisdiction of the Board is exercised over labor relations. The power of the Board is omnipresent wherever such ship may be and whether its contacts with this country are many or few, because it is elementary in international maritime law that the law of the flag country governs on the ships of that country.

Fourth, any weighing of "contacts" on a ship by ship or even company by company basis may prove to be wholly illusory and unrealistic because, as this Court noted in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) "... the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country." *Id.* at 581. Contacts, by the very nature of maritime commerce, are subject to frequent change in important respects according to the dictates of trade. A test such as this is unworkable in maritime commerce when we are concerned with a regulatory law prospective in nature governing the hear[illegible]

of the internal order of a ship at all times and wherever the ship may be.

Fifth, and of the utmost importance, any weighing of "contacts" in international maritime trade carries with it an invitation to conflict and retaliation between sovereign nations. Plainly what is the foreign commerce of the United States is also the foreign commerce of at least one other sovereign nation. Almost any contact in the United States has its counterpart abroad. If the courts of this country are to be free to weigh "contacts" so are the courts of other maritime nations. One may expect at the least that if this Court establishes a "contacts" test to determine the application of American domestic labor law over labor matters concerning foreign flag vessels, the courts and governments of foreign nations may well be influenced to accept such a decision as a guiding authority to establish similar tests and apply their own laws and regulations to vessels irrespective of their flag where the contacts of a vessel with a particular nation meet whatever standards such nation may establish. This might well result in assertion by foreign nations of jurisdiction over labor relations and other internal matters on American flag vessels. We submit that this approach should be rejected because, as this Court warned in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953). "if, to serve some immediate interest, the courts of each [nation] were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." *Id.* at 581.

Sixth, the conflict of law principles applied to determine applicable tort law in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and *Romero* v. *International Terminal Operating*

Co., 358 U. S. 354 (1959) have no application to determine whether or not the regulatory labor laws of this country are to be applied to the great fleets of foreign flag ships that regularly visit our ports. This Court did not even cite the *Lauritzen* decision in the later *Benz* case much less state and consider the factors there reviewed and deemed relevant to influence the choice of law to govern a maritime tort claim.[23] The LMRA regulates employment relationships—the most important aspect of the internal order of a ship. Tort claims under the Jones Act, 41 Stat. 1007 (1920), 28 U. S. C. §668 (1958), obviously do not affect the internal order of a ship. In *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. denied*, 287 U. S. 642 (1932), it was expressly stated:

> ". . . [M]atters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence of the shipowner." *Id.* at 929.

Similarly, this Court in *Uravic* v. *F. Jarka Co.*, 282 U. S. 234 (1931), a case which held that the Jones Act was applicable to a claim by an American stevedore injured while working on a foreign flag vessel in American waters, ruled, *per* Justice Holmes,

> ". . . We see no reason for limiting the liability for torts committed there [on the foreign flag vessel], when they go beyond the scope of discipline and private matters that do not interest the territorial power." *Id.* at 240.

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[23] The factors considered in *Lauritzen* v. *Larsen*, *supra*, were (1) place of wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, and (6) inaccessibility of foreign forum.

E. The Test to Be Applied Is Found in Long Standing Principles of International Law and Comity, Our Treaties With the Republic of Liberia and Other Countries and the Canon of Construction That "An Act of Congress Ought Never to Be Construed to Violate the Law of Nations, if Any Other Possible Construction Remains."

We submit, as stated above, pp. 22-27, that the decision in the *Benz* case is controlling and dispositive of the instant case. However, we state below the principles of international maritime law and comity as well as treaty provisions that support and confirm the construction of LMRA in the *Benz* decision and provide the proper test to be applied rather than the "contacts" test that the state court suggested. We believe the statement by this Court of the test to be applied is important not only in this case but in the administration of the LMRA.

When, as in this case, there is sought to be attributed to the Congress a purpose to project the national labor policy of this country and the jurisdiction of the NLRB to regulate labor relations on board ships of another country, issues of international maritime law are presented. It is elementary that the nationality of a ship is determined by its registry and flag, that all nations are required to recognize the nationality so determined and that the law of the flag country, apart from exceptions having no relevance here, governs all matters involving the internal order of the ship on the high seas and in foreign ports including the ports of this country. These propositions are confirmed by treaty. They would be violated by the construction of LMRA to apply on foreign flag ships.

We submit that the showing on this record that the two ships of petitioner are foreign flag ships is alone enough, under applicable principles of international maritime and treaty law, to defeat application of LMRA to those ships. As here and in *Benz*, the crew on the ships are aliens serving under foreign articles entered abroad. We submit that these facts are no more than attributes of foreign flag ships and that the decisive fact is foreign registry and flag.

The application of international law or the law of nations to statutory construction had its origin in our country in Chief Justice Marshall's early pronouncement in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804), that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." This venerable rule was recently reaffirmed in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953):

> ". . . By usage as old as the Nation, such statutes [shipping laws of the United States] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id.* at 577.

It was specifically given weight in *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 at 25,495 (D. D. C. Jan. 18, 1962), holding the LMRA inapplicable to foreign ships.

The whole concept of statutory construction in deference to international law was well expressed in Justice Day's opinion respecting our tariff laws:

> "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law." *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913).

We submit the following propositions of international maritime law that should be recognized in the construction of the LMRA.

1. The Nationality of Petitioner's Vessels Is, by Specific Treaty Provision as Well as Under Settled International Law, Determined by Their Flag

Article XV of the treaty with Liberia provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."[24]

Petitioner's vessels, lawfully registered under the laws of Liberia, are, under this provision, Liberian vessels not only on the high seas but in "the territorial waters" of the United States.

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[24] Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

The flag recognition provision of Article XV of the Liberian Treaty is declaratory of international law.[25] From the earliest times the nationality of a ship has been determined solely by the flag it flies. All other factors are irrelevant. Advisory opinion dated June 8, 1960, of the International Court of Justice in the Matter of the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 Am. Mar. Cas. 1005; *Lauritzen* v. *Larsen*, 345 U. S. 571, 584 (1953); *The Muscat Dhows Case (France* v. *Great Britain)* 1905, The Hague Court Reports 93, 96, 99 (Scott ed. 1916); McDougal, Burke & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. of Int'l L. 25, 27-28, 56-60 (1960); Wilson, International Law 123 (3d ed. 1939); 1 Lauterpacht, Oppenheim's International Law, §255, §261 (8th ed. 1955); Rienow, The Test of the Nationality of a Merchant Vessel 42-49, 73-78, 79-116, 187, 214, 218-219 (1937); Higgins & Colombos, The International Law of the Sea 196 (2d rev. ed. 1952); 1 Hyde, International Law, Chiefly as Interpreted and Applied by the United States, 810, 811 (2d rev. ed. 1951); Walker, *Provisions on Companies In United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 382 (1956).

This point is believed to be so clear as to require only the above references.

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[25] Although customary reference is made to the jurisdiction of the flag, technically this is incorrect. The flag is merely prima facie evidence of nationality which actually "is determined by the state of registration; in other words by the ships documents". Starke, Introduction to International Law, 209, n. 2 (4th ed. 1958) and see Wilson, International Law, 123 (3d ed. 1939).

2. *International Maritime Law Recognizes that Jurisdiction Over the Internal Affairs of a Vessel Rests Exclusively With the Flag State*

The foregoing proposition is firmly established and accepted by American judicial decisions. It would lose all meaning if it were denied application to labor relations with the result that the varying labor laws of different nations were to be applied as a vessel touched at the ports of different nations. Such a result would mark the end of any rule of law in international maritime commerce. It is unthinkable and does not find support in any judicial decision. On the contrary, the authorities all support the proposition stated above.

The intervention of one nation's economic policy in the affairs of another nation is offensive and may breed resentment and retaliation. This Court and lower federal courts have clearly sounded the warning against construing the Labor Act to intrude into foreign ships for this very reason. See *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 147 (1957); *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962); *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962).

In *The "Scotland"*, 105 U. S. 24 (1881), this Court said:

> ". . . Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and

the power of the master to bind the ship or her owners." *Id.* at 30.

In *Wildenhus's Case*, 120 U. S. 1 (1887), it was stated:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." *Id.* at 12.

More recently, in *United States* v. *Flores*, 289 U. S. 137 (1933), this Court cited with full approval the following, from 6 WEBSTER'S WORKS, 306, 307:

> ". . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law

> of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." *Id.* at 156.

The rule was also stated by Justice Brandeis in an unpublished Supreme Court opinion:

> ". . . [B]y general consent of the nations, the regulation of the rights and duties of officers and crews are, like matters of internal discipline, to be determined by the law of the country to which the vessel belongs—and not by the law of the place where she may, from time to time, happen to be. This undoubtedly is the general rule."[26]

There have been varying theories upon which this law has developed. Formerly this principle of the exclusive jurisdiction of the flag State over the internal order of its ships was based on a theory of territorial extension: "merchantmen on the high seas are in certain respects

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[26] Bickel, *"Strathcarn S.S. Co.* v. *Dillon—An Unpublished Opinion by Mr. Justice Brandeis,"* 69 HARV. L. REV. 1177, 1185 (1956). *Accord, e.g., The Belgenland,* 114 U. S. 355, 367 (1885); *Evangelinos* v. *Andreavapor Cia. Nav., S. A.*, 162 F. Supp. 520 (S. D. N. Y. 1958); *Grivas* v. *Alianza Compania Armadora, S. A.*, 150 F. Supp. 708, 711, 712 (S. D. N. Y. 1957).

treated as though they were floating parts of the territory of the State under whose flag they legitimately sail."[27] This theory of territoriality is now largely out of favor. Subjected to criticism by the leading British scholar, Professor William Hall,[28] this "fiction" has given way to a theory of jurisdiction based on practical necessity:

> "Every state has jurisdiction over ships flying its flag on the high seas; it may apply its law, civil and criminal, to all on board irrespective of their nationality. The justification of this principle is simply that some law must prevail on ships, and there is no other law to compete with that of the flag state. . . ."[29]

Higgins and Colombos well summarize this thesis of jurisdiction based on practical necessity:

> "There are sound practical reasons for the rule of subjection of ships to the laws of their State and it is unnecessary to employ the fiction of territoriality to account for it. . . . States make certain rules for providing ships with their nationality and authorizing them to fly their flags. There is therefore an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-

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[27] 1 Lauterpacht, Oppenheim's International Law, §172a (8th ed. 1955).

[28] Hall, International Law, §§76-78 (Higgins 7th ed. 1917).

[29] Brierly, The Law of Nations, 238 (5th ed. 1955). *Cf.* Jessup's strong attack on the "fiction of territoriality," Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 191-92 (1927). *Cf. also* Pergler, Judicial Interpretation of International Law in the United States, 107-08 n. 34 (1928).

> State. . . . It is therefore accepted as a rule of international law that a merchant ship on the high seas is, under normal circumstances, subject only to the jurisdiction of the State whose flag she is entitled to fly."[30]

In the recent case of *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61. 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962), the District Court of the District of Columbia, *per* Judge Holtzoff, recognized this rule, citing extensively from *Wildenhus's Case*, *supra*, in its decision granting an injunction against the conduct of an election by the NLRB aboard Honduran Flag ships owned by Empresa Hondurena de Vapores, S. A., a wholly owned subsidiary of United Fruit Company, for the reason that the LMRA does not confer any power on the NLRB to conduct such an election. In the related case *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962) a separate injunction against the conduct of an election by the NLRB on the same Honduran flag vessels was granted on the ground that the LMRA was inapplicable. The Circuit Court described the flag recognition clause in the Honduran treaty as the "beginning" of its investigation and noted that the case "goes far beyond the flying of the Honduran flag, important as *Lauritzen* [v. *Larsen*] teaches that to be." *Id.* at 25,892.

The practical considerations that support the exclusive jurisdiction of the flag State have special application to labor laws because labor relations necessarily involve a continuing relationship between employer, master and crew

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[30] Higgins & Colombos. THE INTERNATIONAL LAW OF THE SEA. 195 (2d rev. ed., 1952).

not only while the ship is in the ports of the world but also while it is on the high seas. The practical necessity is present wherever the ship may be, and jurisdiction over labor relations must surely be determined by a precise standard recognized by all nations. To implement a new standard of jurisdiction based on "contacts" would be to invite confusion, resentment, and probable retaliation among nations. Jurisdiction over the internal affairs of ships of all flags, including American flag ships, would then be a question for each nation to decide for itself by weighing the contacts, by whatever various and varying standards each nation might choose to establish for itself. It would be a departure from the recognized and long standing rule of flag law under which international commerce by water has been conducted ever since men have gone to sea.

We submit that our domestic labor laws are to be construed in conformity with the principles of international law stated above. This means that full effect should be given to the canon of construction stated in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804) that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"; that a construction to extend the coverage of the LMRA to labor relations on foreign vessels would violate the principle of international maritime law that jurisdiction over the internal affairs of a vessel rests exclusively with the flag state; that no such construction is required or suggested in the legislative history and that full effect is given to the LMRA when it is applied to matters of domestic concern which in the maritime industry are labor relations on ships of the American merchant marine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of the State of New York should be reversed and the cause remanded for further proceedings.

Dated: February 21, 1962.

Respectfully submitted,

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APPENDIX

Treaty of Friendship, Commerce and Navigation With the Republic of Liberia

August 8, 1938, 54 Stat. 1739, T.S. No. 956

(effective November 21, 1939).

Article XV.

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Labor Management Relations Act (Taft-Hartley Act), 1947, as Amended (Title 29 U. S. C.)

Section 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful

procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. [June 23, 1947, c. 120 §1, 61 Stat. 136.]

Section 151.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedures of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by de-

pressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other

mutual aid or protection. [July 5, 1935, c. 372, §1, 49 Stat. 449; June 23, 1947, c. 120, Title I, §101, 61 Stat. 136]

Section 152.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • •

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • •

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [July 5, 1935, c. 372, §2, 49 Stat. 450, June 23, 1947, c. 120, Title I, §101, 61 Stat. 137]

MOTION FILED FEB 23 1961 SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
and
BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 469

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF THE REPUBLIC OF LIBERIA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Liberia hereby respectfully moves for leave to file a brief *amicus curiae*. Petitioner has consented to the filing of such a brief. Respondents have not.

The Republic of Liberia's brief will be limited to the single but underlying issue of whether the reach of the Labor Management Relations Act, as amended [61 Stat. 136 (1947), 29 USC § 141-187] extends to vessels properly registered under the Liberian flag pursuant to the laws of the Republic of Liberia. This question arises by virtue

of the July 7, 1961 decision of the Court of Appeals of the State of New York, reversing (4 to 3) the July 6, 1960 (3 to 2) decision of the Appellate Division, First Judicial Department, holding that the Supreme Court, New York County (Greenberg, J.) had jurisdiction to restrain picketing of Petitioner's Liberian-flag vessels. The Court of Appeals rested its decision on the exclusive jurisdiction—or the "arguability" of exclusive jurisdiction—of the National Labor Relations Board. The Court of Appeals decision is reported at 10 NY 2d 218. The Appellate Division, First Department's decision is reported at 11 App. Div. 2d 177, 202 NYS 2d 692. The May 19, 1960 oral decision of Justice Greenberg in the Supreme Court is not as yet officially reported, but may be found at 1960 AMC 991.

Between ten and eleven million tons of shipping are registered under the Liberian flag. Liberian merchant shipping was determined to be the third largest in the world (it is now the fourth) by the International Court of Justice in its Advisory Opinion on June 8, 1960 (*IMCO Constitution of the Maritime Safety Committee Case*, 1960 AMC 1005). The maintenance of its status as a major maritime nation is a matter of highest importance to the Republic of Liberia.

Liberia is eager to protect its shipping from discriminatory attack by any interest and to maintain its jurisdiction and control over the men employed on board the vessels of its flag, under generally recognized principles of international law and the provisions of treaties with the United States (Treaty of Friendship, Commerce and Navigation, 1938, 54 Stat., Part 2, p. 1739; Consular Convention, 1938, 54 Stat., Part 2, p. 1751).

Liberia believes that, possibly because of emphasis on other points, the international law and treaty considerations in which it is so particularly and vitally interested were inadequately developed and presented in the courts

below and doubts that they will be adequately developed and presented here. It is for this reason that it requests that this motion be granted.

Respectfully submitted,

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Dated: February 21, 1962

BURLINGHAM UNDERWOOD BARRON
WRIGHT & WHITE
Of Counsel

IN THE

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BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

Statement

The interests of the Republic of Liberia in the instant case are limited but important. They lie at the heart of the dispute and are contrary to the very basis claimed for the National Labor Board's jurisdiction. It is the position of the Republic of Liberia, as well as that of the Petitioner, that, under controlling principles of international law and of treaties with the United States, the National Labor Relations Board is precluded from taking jurisdiction of the matters involved, so that no question of even "arguability" can arise.

The decision of the Court of Appeals, which is contrary to the most recent federal decisions on the subject [*Sociedad*

Nacional de Marineros de Honduras v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 at 25,945, 25,946 (D. D. C. Jan. 18, 1962); *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374, at 25,889, 25,890 (2nd Cir. Jan. 12, 1962)], would most seriously threaten the following objectives of the Government of Liberia:

1. The according of full faith and credit to registration of vessels under its flag.

2. The assurance of freedom of the international commerce served by its vessels from unwarranted, unlawful and conflicting administrative regulations and controls.

These objectives touch on fundamental principles of international law as well as practical objectives of commerce. International commerce cannot thrive in a climate of jurisdictional controversy. Its development necessitates the avoidance of conflicting controls on the part of the many nations at whose ports a vessel may call during the course of her voyage. It was for the protection of these fairly obvious requirements that the rules of international law, relied upon here, grew up. These rules, which are the basis of international trade and upon which investments in world-shipping by the interests of many nations have been made, should not be lightly thwarted in an effort to extend jurisdiction under an American statute quite clearly designed to regulate relations between American employers and American employees.

Such considerations of international law are most appropriate for this Court (*Interhandel Case*, 21st March 1959 ICJ Reports 1959 pp. 6, 28; *MacLeod* v. *United States*, 229 U. S. 416, 434 [1916]).

Argument

The position of the Republic of Liberia is nothing more than that announced by this Court in *Benz* v. *Compania Naviera Hidalgo S. A.*, 353 U. S. 138 (1957), which should be controlling here.

It is submitted that the controls over employment and employment policies on Liberian vessels are singularly appropriate for Liberia and singularly inappropriate for the United States. This is especially true where, as here, no American citizens are involved and the act of employment takes place outside of and at great distances from the United States. Only an extremely small proportion of the men's time is spent in any American port. Their primary activities are at sea and abroad and have nothing to do with American policies or objectives.

Actually, Liberia has not merely the privilege, but also the duty to regulate and control all matters of employment and in relation to the internal management of Liberian vessels. Liberia does regulate and control such matters and has a growing body of law in such important areas as minimum age, working hours and overtime wages, maintenance and care of sick or injured seamen, repatriation and unionization.[1]

Liberia has been an active participant in all recent international maritime conferences and is a signatory to the international conventions relating to maritime affairs set forth in Appendix A annexed hereto. Its position in respect of prior assertions of Labor Board jurisdiction has been made clear by several notes to the Department of State of the United States.

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[1] Liberian Code of Laws, 1956, Vol. II, Title 22: Maritime Law (as amended), Cornell University Press §§ 312, 313, 314, 315, 316, 369.

There can be little doubt that it is the Liberian law which should control rather than the law of the several ports at which Liberian vessels call in the course of their voyages, even if they be regular ports of call as in any liner service.

In speaking of this principle, this Court, in *In re Ross*, 140 U. S. 453 (1891), endorsed the position of the Secretary of State of the United States put as follows:

> " 'That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. • • •
>
> The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves.' " (at pp. 473, 474)

The same conclusion was reached in *United States* v. *Flores*, 289 U. S. 137, 155-7 (1932).

The theoretical basis for the application of the law of the flag is not completely uniform, and it is doubtless the compelling necessity of the rule which is important, rather than the method by which it is arrived at.

An interesting and helpful discussion of the question of extraterritorial sovereignty is contained in the English decision of *The Queen* v. *Keyn*, 1876, 2 Ex. D. 63. Cockburn L. J., reviewing the authorities, said there:

> "Leges cujusque imperii', says Huber de Conflictu legum, citing Dig. de jurisdictione, l. ult., 'Vim habent intra terminos ejusdem reipublicae, omnesque ei subjectos obligant, nec ultra'. 'Extra territorium jus dicenti impune non paretur' is an old and well-established maxim. 'No sovereignty', says Story (Conflict of Laws, s. 539), 'can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals'. 'The power of this country', says Dr. Lushington in the case of *The Zollverein* [1 Sw. Adm. 96], 'is to legislate for its subjects all the world over, and as to foreigners within its jurisdiction, but no further'. (p. 160)
>
> . . . . .
>
> To the general rule to which I have referred there is one exception—that of a foreigner on board the ship of another nation. But the exception is apparent rather than real; for by the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offence committed against it." (p. 161)

The foregoing discussion is not intended to imply that there is never any basis for local jurisdiction. The decisions and the text writers on the subject agree that there is a limited area for the applicability of local laws and local

authority in relation to police protection, health protection and local safety. This exception does not extend to relations of the ship or her owners to members of the crew—clearly and intimately related to the "internal management and control of the vessel". Such matters are strictly for determination by the state of registration under the laws of that state.

If local administrative bodies at each of the several ports of call were at liberty to assert their several alleged powers and controls, only conflict and confusion would ensue, and commerce would be brought to a veritable standstill. This was vigorously brought out in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), where the Court said:

> "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." (p. 581)
>
> "[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." (p. 582)

Respondents seek to avoid the impact of these controlling principles by discriminatory refusal to give full recognition to the foreign-flag status of Liberian shipping, claiming—as circumstances suggest—that it is the nationality of the stockholders or the employment of the vessel which is determinative.

This proposition was before the International Court of Justice in the *IMCO Constitution of the Maritime Safety*

Committee Case, 1960 AMC 1005, where the Court held that the criterion to be employed in determining the largest ship-owning nations was that of registration. In so doing, it rejected the argument put forward on behalf of nationality of stockholders, saying:

> "In particular it is unlikely that it was contemplated that the test should be the nationality of stockholders and of others having beneficial interests in every merchant ship: facts which would be difficult to catalogue, to ascertain and to measure. To take into account the names and nationalities of the owners or shareholders of shipping companies would, to adopt the words of the representative of the United Kingdom during the debate which preceded the election, 'introduce an unnecessarily complicated criterion'. Such a method of evaluating the ship-owning rank of a country is neither practical nor certain. Moreover, it finds no basis in international practice, the language of international jurisprudence, in maritime terminology, in international conventions dealing with safety at sea or in the practice followed by the Organization itself in carrying out the Convention. On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application." (p. 1026)

The Court also rejected the notion of the so-called "genuine link", somewhat akin to arguments made below, saying:

> "It was contended in the course of the arguments that the Assembly, in assessing the size, in relation to ship-owning, of each country, was entitled to take into consideration the notion of a genuine link which it was claimed should exist between ships and the countries in which they are registered. Article 5 of the unratified Geneva Convention on the High Seas of 1958 was invoked in support of this contention. That Article provides:
>
> 'Each State shall fix the conditions for the grant of its nationality of ships, for the registration of

ships in its territory, and for the right to fly its flag. * * *"

The Court having reached the conclusion that the determination of the largest ship-owning nations depend solely upon the tonnage registered in the countries in question, any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court for an advisory opinion." (p. 1028).

The Government of the United States fully supported the position of Liberia before the International Court of Justice, taking the position adopted by the Court.

The decision of the international Court is the same as that of courts here since the days of *The Charming Betsy*, 6 U. S. [2 Cranch.] 64, 122, 124 [1804].

Recently the following American lower court decisions have specifically held that it is the law of Liberia, as the registration state, which, to the exclusion of all others, governs employment relations aboard the ship: *Evangelinos* v. *Andreavapor Cia. Nav., S. A.*, 162 F. Supp. 520, 521-2 (S. D. N. Y. 1958); *Grivas* v. *Alianza Compania Armadora*, 150 F. Supp. 708 (S. D. N. Y. 1957), modified 276 F. 2d 822 (1960) at p. 285; *McQuade* v. *Compania de Vapores San Antonio, S. A.*, 131 F. Supp. 365 (S. D. N. Y. 1955).

The status given the registration state in respect of control over affairs on board its vessels has had the full support of writers of authority:

Oppenheim: "It [a State] can in particular authorize such vessels to sail under its flag as are the property of a foreign subject; but such foreign vessels sailing under its flag fall thereby under its jurisdiction * * * Private vessels are considered as though they were floating portions of the flag State

only in so far as they remain whilst an open sea in principle under the exclusive jurisdiction and protection of the flag State. Thus, the birth of a child, a will or business contract made, or a crime committed on board ship, and the like are considered as happening on the territory, and therefore under the territorial supremacy, of the flag State.[2]

Hall: "It is unquestioned that in a general way a State has the rights and the responsibilities of jurisdiction over ships belonging to it while they are open sea, but a difference of opinion exists as to the theoretical ground upon which the jurisdiction of the State ought to be placed.[3]

Colombos:[4] § 343, Jurisdiction over vessels in port: "The practice followed in this connection by the majority of continental States is to disclaim jurisdiction over all matters on board foreign ships and to reserve the right to intervene only when the peace of the port is endangered. This practice is based on the famous decision of the French *Conseil d'Etat* in 1806, in *The Sally* and *The Newton*, two American ships in French ports in each of which one member of the crew assaulted the other. It was held by the French Court that in the case of offences affecting only the vessel and her crew or her internal discipline, the local authorities should not interfere except where the offences compromised the tranquillity of the port or their assistance was invoked."

The particularly close connection between registration and the law applicable on board ship is also reflected in the practice of the International Labor Organization. In 1936, during the course of the 21st Session of the International Labor Organization Conference an interesting discussion arose as to whether nationality, the flag or registration is the most appropriate criterion for the demarcation of the scope of international Conventions relating to seamen. The

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[2] International Law, Vol. I (8th ed., 1955), pp. 595 and 597.

[3] International Law (8th ed., 1924), p. 301.

[4] International Law of the Sea, 4th revised edition 1959, p. 279.

discussion led to the appointment of a Coordination Committee which recommended registration as the most appropriate criterion, and effect was given to this recommendation in the five important Conventions adopted at the 21st Session of the Conference.

Dr. Jenks[5] has explained the decision of the I. L. O. not to employ the concept of nationality for this purpose in the following terms:

> "Nationality might be thought to refer not to the flag flown, the right to fly a particular flag being normally, as documents before the Committee showed, determined by registration, but to the nationality of the ownership and control of the vessel, and perhaps even to the nationality of the real as distinct from the apparent ownership and control. It was pointed out to the Committee that nationality, understood in this sense, is not the criterion which determines the jurisdictional rights of States over conditions of employment on board, and that the criterion defining the obligations to be assumed by States must necessarily correspond with that which, under general rules of international law, delimits the extent of their powers of control."

The various International Labor Conventions clearly and specifically adopt the standard of registration and thereby reject all others. These Conventions include the following, dealing pointedly with maritime affairs:

> Inspection of Emigrants on Shipboard. ILO Convention No. 21 (1926) [38 UNTS, p. 281]
>
> Repatriation of Seamen. ILO Convention No. 23 (1926) [38 UNTS, p. 315]
>
> Annual Holidays with Pay for Seamen. ILO Convention No. 54 (1936) [ILO Conventions and Recommendations, 1919-1949, p. 371]

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[5] Jenks, "Nationality, the Flag and Registration as Criteria for Demarcating the Scope of Maritime Conventions", Journal of Comparative Legislation; Vol. XIX (1937), p. 245, at p. 249. Dr. Jenks was a legal adviser to the I.L.O. at that time.

Sickness, Injury or Death of Seamen. ILO Convention No. 55 (1936) [40 UNTS, p. 169]

Sickness Insurance of Seamen. ILO Convention No. 56 (1936) [40 UNTS, p. 187]

Hours of Work on Board Ships and Manning. ILO Convention No. 57 (1936). [ILO Conventions and Recommendations, 1919-1949, p. 387]

Certification of Ship's Cooks. ILO Convention No. 69 (1946) [ILO Conventions and Recommendations, 1919-1949, p. 610]

Medical Examination of Seafarers. ILO Convention No. 73 (1946) [ILO Convention and Recommendations, 1919-1949, p. 823]

Wages, Hours of Work on Board Ships and Manning. Revised 1949. ILO Convention No. 93 (1949) [ILO Conventions and Recommendations 1919-1949, p. 823]

Without unduly extending this discussion, it is in order to mention other important maritime conventions adopting the same standard. Special reference might be made to the Convention for the Safety of Life at Sea, 1948 [3 UST 3450; 1953 AMC 1]; the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 [75 Stat. 402]; Load Line Convention, 1930 [47 Stat. 2228].

There was the suggestion below that "contacts" with the United States, consisting principally of fairly regular and frequent calls at United States ports and the booking of passengers there, somehow provided a basis for Board jurisdiction—this notwithstanding that the so-called "contacts" are scarcely more than those of the *Queen Mary*. This is wholly without substance. The same reasoning would give the United States jurisdiction over all vessels in liner service calling at American ports and would authorize every nation at whose ports American vessels call to take unto themselves control over the relations between American employers and American seamen. International shipping is on a world basis and those participating in it

must necessarily have frequent and regular "contacts" with numerous ports throughout the world. Mere "contacts" of a vessel have never provided a basis for controlling employer-employee relations aboard her. They should not now.

The contention that the Labor Board might have jurisdiction is not buttressed by the Union's argument that its members are deprived of job opportunities by the very existence of the Liberian merchant marine. It by no means follows that the complete destruction of the Liberian merchant marine would create any jobs for American seamen. As demonstrated by past experience, a much more likely result would be an increase in the foreign tonnages of other maritime nations.

This contention, if valid, could be made in respect of foreign competition of every kind, and, unless all precedents and current policies are to be abandoned, the mere existence of actual or potential foreign competition must fail to create a basis for administrative jurisdiction and regulation.

There remains for consideration the specific impact of treaties between the Republic of Liberia and the United States. Attention is directed to the Treaty of Friendship, Commerce and Navigation of 1938 (54 Stat. 1739) particularly Article XV thereof, p. 1745,[6] and the Consular Convention, also of 1938 (54 Stat. 1751), particularly Article X thereof, p. 1756.[7] The pertinent articles are printed as appendices hereto.

The Treaty of Friendship specifically provides that privately owned vessels under the flag of either party shall be deemed vessels of the party whose flag is flown. This should of itself dispose of various arguments advanced by Respondents in their efforts to avoid according full faith and credit to Liberian registrations.

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[6] Appendix B.

[7] Appendix C.

The Consular Convention, Article X, gives to consular officers exclusive jurisdiction over controversies arising out of the internal order of private vessels of their country and provides that the Consul alone shall exercise jurisdiction in disciplinary cases. It also gives to the Consul jurisdiction in the adjudication of wage disputes and the execution of contracts relating to wages.

This Consular Treaty was specifically recognized and given effect in *Keramiotis* v. *Basilia Compania Maritima*, 176 F. Supp. 269 (S. D. N. Y. 1959), where Judge Cashin stated that there was no doubt that the law of Liberia was controlling in respect of an alleged unlawful discharge, rather than the general maritime law of the United States.

The same result was reached in applying a similar Norwegian treaty stipulation in *The Wind*, 22 F. Supp. 883 (E. D. Pa. 1938).

Treaty provisions in situations of this kind are ordinarily given paramount consideration (*The Belgenland*, 114 U. S. 355, 364 (1885); *The Taigen Maru*, 73 F. 2d 922, 923 (1934)), and should be here. There is no occasion to construe the Labor Management Relations Act in such manner as to accord it extraterritoriality contrary to outstanding treaty provisions. It is well settled that "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U. S. 102, 120 (1933).

The decision of this Court in *Benz* v. *Compania Naviera Hidalgo S. A.*, 353 U. S. 138, makes it abundantly clear that the Act cannot be construed so as to raise any question in this respect. Mr. Justice Clark there said:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the

Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill." (pp. 143, 144)

CONCLUSION

The sole jurisdiction over the subject matter being that of the Republic of Liberia, there is no room for the jurisdiction of the National Labor Relations Board. There is not even a basis for "arguability" of jurisdiction. There is therefore no impediment to a state court injunction.

Accordingly, judgment of the Court of Appeals of the State of New York should be reversed and the case remanded for further proceedings.

Dated: February 21, 1962.

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New York 4, N. Y.

BINGHAM UNDERWOOD
BARROS WRIGHT & WHITE,
of Counsel

APPENDIX A

List of international Conventions related to maritime affairs, to which the Republic of Liberia is a signatory power.

1. Inter Governmental Maritime Consultative Organization, 1958. [9 UST 621; TIAS 4044].

2. International Convention of Safety of Life at Sea, 1948. [3 UST 3450; TIAS 2495; 1953 AMC 1].

3. International Load Line Convention, 1930. [47 Stat. 2228; TS 858].

4. International Telecommunications Convention, 1947. [TIAS 3286].

5. North Atlantic Fur Patrol. [1956 TIAS 3597; 7 UST (2) 1962].

6. ILO Convention (No. 53)—Officers' Competency Certificates. Geneva, 1936. [40 L. N. T. S. p. 187; 54 Stat. 1683; TS 950].

7. ILO Convention (No. 55)—Shipowners' Liability (Sick and injured Seamen). Geneva, 1936. [40 L. N. T. S. p. 169; 54 Stat. 1693; TS 951].

8. ILO Convention (No. 58)—Minimum Age at Sea Revised. Geneva, 1936. [54 Stat. 1705; TS 952].

APPENDIX B

Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia. Signed at Monrovia August 8, 1938.

ARTICLE XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

APPENDIX C

Convention between the United States of America and Liberia respecting Consular Officers. Signed at Monrovia October 7, 1938

ARTICLE X

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws.

When an act committed on board of a private vessel under the flag of the State by which the consular officer has been appointed and within the territorial waters of the State to which he has been appointed constitutes a crime according to the laws of that State, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the State to which he is appointed for the purpose of observing the proceedings or of rendering assistance as an interpreter or agent.

MOTION FILED JUN 22 1962

LIBRARY
SUPREME COURT, U. S.

IN THE

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OCTOBER TERM, 1961

No. 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

AND

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

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Dated, New York, N. Y.
June 25, 1962.

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MOTION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Government of the United Kingdom of Great Britain and Northern Ireland respectfully moves for permission to file a brief *amicus curiae* in the above-entitled action for the purpose of calling to this Court's attention its serious concern with a situation which, if permitted to continue, could well result in the interference with the international commerce and the free movement of merchant fleets of all maritime nations. Petitioner has consented to the filing of such a brief. Respondents have not.

The Government of the United Kingdom, as one whose flag flies over the second largest merchant fleet in the world, is directly interested to insure that its merchant fleet be free from interference by an American labor union or by a

labor union of any other foreign nation. Beyond the scope of international conventions and treaties, voluntarily entered into by free governments, it is solely within the domestic economy and the domestic law of each maritime national to establish the rules concerning the relationship amongst seamen, their officers and shipowners.

When the highest court of the State of New York apparently states its inability to prevent an American labor union from interfering with the internal relations between the foreign crew and foreign owner of a foreign flag vessel in a United States port because of a federal statute obviously intended to control only the relationship between United States employees and their employers, then this Government must submit its views to this Honorable Court.

For the foregoing reason it is respectfully requested that this motion be granted.

Respectfully submitted,

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Counsel for The Government of the
United Kingdom of Great Britain
and Northern Ireland.

Dated: June 25, 1962.

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Statement

The Government of the United Kingdom of Great Britain and Northern Ireland does not seek to complain about the provisions of the Labor Management Relations Act or the manner in which that Act is interpreted by Federal or State Courts or by Federal Agencies in the United States so long as the labor and the management whose relations are in dispute are domestic. Nor has The Government of the United Kingdom any intention, and it is not the purpose of this brief, to interfere in the domestic affairs of another sovereign state. What does gravely

concern. The Government of the United Kingdom is when the activities of its merchant fleet and its right to engage freely in international trade with friendly nations are seriously threatened by the decision of the highest court of the State of New York. Apparently, that court held that the relations between a foreign crew and the foreign owner of a vessel which flew a foreign flag is *or might be* subject to the jurisdiction of the National Labor Relations Board and the provisions of the Labor Management Relations Act if the foreign flag vessel happened to call at a United States port with any degree of regularity.

Such a holding opposes the traditional internal economy doctrine long applied by all nations to foreign flag vessels temporarily in their ports. It gives an unwarranted extra-territorial effect to domestic law and, if sustained, would lead to strife and chaos in international trade when local labor unions at numerous ports of call picketed a vessel and sought to organize her crew under the local foreign equivalents of the Labor Management Relations Act. Indeed, it is directly opposed to the expressed purpose of that Act which is "to promote the free flow of commerce". To expose the crews of vessels to the enticements of competing labor unions in various countries and to expose shipowners to an equal number of jurisdictional disputes can only result in a marked reduction in the volume and free flow of international trade to the detriment of the United States and all nations of the world.

ARGUMENT

"Perhaps the most venerable and universal rule of Maritime Law relevant to our problem is that which gives cardinal importance to the law of the flag."

The foregoing quotation of this Honorable Court's opinion in *Lauritzen* v. *Larsen*, 345 U. S. 571, 584, epitomizes the position of the Government of the United Kingdom in the present case.

The law of the flag is not only a traditional doctrine in international maritime law but is also a practical, vitally useful rule, which, as clarified and strengthened in recent decisions of this Court, protects and promotes the free flow of international commerce.

This Court in the *Lauritzen* case stated that each state under international law has the right to determine the conditions under which it will permit a vessel to fly its flag and that only the registering state may question the regularity of a vessel's registration. It was also noted by this Court that there must be some law on shipboard and that the law cannot change as the vessel moves through the waters of numerous states. See also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354.

From the practical point of view, it is imperative that this doctrine be preserved for it is common knowledge that different countries, because of natural resources or national talents, contribute in differing ways to the well-being of the countries of the word. It is also common knowledge that other nations supply the vessels which carry the bulk of the world's international commerce. Norway, for example, with a population of about three and a half million, contributes about twelve million gross tons of shipping to the carriage of cargoes in international trade while many nations supply practically no tonnage for the carriage of the world's cargoes. These maritime nations are busily engaged in carrying both dry and liquid cargoes to or from the ports of every friendly country and by so doing contribute greatly to the economic well-being of the community of nations. Many of their vessels rarely see their home ports, being bunkered, supplied and repaired at convenient ports throughout the world with relief crews being flown to ports of call of the vessel at regular intervals. Such vessels none the less are continuously subject to the law of their flag and the relations among crew, officers and owner are governed by that law. It would create a situation of unacceptable confusion having the most adverse effects on the internal discipline of such vessels and the rights and

duties of the crew, the officers and the owner if such relations were to change from port to port and sea to sea.

Moreover, the Government of the United Kingdom do not consider that they could properly claim that the crew of an American flag vessel which touched British ports with some degree of regularity should be subject to British labor standards and practices. It would be equally improper for the Government of the United States to suggest that the crew of a vessel flying the British or any other flag should be subject to the Labor Management Relations Act of the United States (29 U. S. C. Section 141 et seq.). Interference in the relations between foreign labor and foreign management on foreign flag vessels could not long remain an exclusively American privilege. Nor could it remain the exclusive privilege of any maritime nation. All maritime nations should bear in mind the wise words of this Court when it warned "of the necessity for mutual forbearance if retaliations are to be avoided". *Lauritzen* v. *Larsen*, 345 U. S. 571, 582.

This Court is of course aware that other leading maritime nations have laws regulating labor and management relations, laws which affect the seamen who man the vessels flying their flags, and that these laws in many, if not in all instances, long antedate our own.

As was said by this Court in *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 123, and quoted in the *Lauritzen* case:

> "And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . ."

The peace and dignity of the United States and the tranquillity of any one of her ports are not put in jeopardy by

permitting foreign flag vessels to resolve their labor-management relations in accordance with the law of the vessel's flag despite the temporary presence of that vessel at a United States port. The dignity of the country and the tranquillity of her ports will not be furthered by making her ports the arena within which the relations between foreign labor and foreign management are thrashed out.

The basic issues of this case cannot be obscured by the phrase "shuttle service", when such "shuttle service" is the prime object of the free flow of international commerce, based on the law of the flag. *Lauritzen* v. *Larsen*, 345 U. S. 571, 581. Moreover this Court is aware that the S.S. United States and the S.S. Queen Mary are both engaged in "shuttle service" (and that such vessels are owned by steamship lines having subsidiary offices in London and New York).

This Court clearly recognized in *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 147, that it is not a judicial function "to run interference in such a delicate field of international relations", as presents itself in the relations of a foreign crew to a foreign owner. And relegating foreign shipowners to a federal agency because of the intrusion of an American labor union in the internal economy and discipline of a foreign vessel is "interference" never contemplated by the Congress of the United States, as this Court has forcefully pointed out. In the *Benz* case, this Court, referring to the Labor Management Relations Act, said (353 U. S. at 143-144):

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill."

This language and quotation in that opinion by this Court of the House Committee on Education and Labor Report which described the then Bill as "a bill of rights both for *American* workingmen and for their employers" conclusively establish the lack of application of that Act by Congressional intent or judicial interpretation to the present case. The lower courts in the State of New York were therefore correct in directing an American labor union to keep its hands off foreign seamen serving aboard foreign flag vessels (which, in this case, are owned by foreign nationals).

It is submitted that the "arguably subject rule", set forth in *San Diego Building Trade Council Union* v. *Garmon*, 359 U. S. 236, is not applicable to the facts of this case, as Judge Fuld pointed out in his dissent in the New York Court of Appeals decision. It is the *Benz* case which controls. The relations between a labor union and a California lumber dealer are truly domestic. The relations between a ship's crew and her owner should continue to be governed by the law of the vessel's flag.

CONCLUSION

The Law of the Flag should control in this case. Therefore, the judgment of the Court of Appeals of the State of New York should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Dated, New York, N. Y.,
June 25, 1962.

MOTION FILED JUN 29 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
and
BRIEF OF THE REPUBLIC OF PANAMA AS *AMICUS CURIAE*

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MOTION OF THE REPUBLIC OF PANAMA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Panama respectfully moves for leave to file a brief *amicus curiae*. Petitioner has consented to the filing of such a brief. Respondents have not.

The Republic of Panama's brief will be limited to the basic issue of whether the Labor Management Relations Act, as amended [61 Stat. 136 (1947), 29 U. S. C. §§ 141-187] extends to foreign flag vessels and their foreign seamen working under foreign seamen's articles entered into abroad, the ships having temporarily come into American waters. This question arises as a result

of the July 7, 1961 decision of the Court of Appeals of the State of New York, reported at 10 N. Y. 2d 218, reversing (4 to 3) the July 6, 1960 (3 to 2) decision of the Appellate Division, First Judicial Department, holding that the Supreme Court, New York County (Greenberg, J.) had jurisdiction to restrain picketing of Petitioner's Liberian flag vessels. The Court of Appeals rested its decision on the exclusive primary competence—or jurisdiction—of the National Labor Relations Board over disputes "arguably" subject to the Labor Management Relations Act.

The Republic of Panama is gravely concerned over this decision which seriously threatens the sovereign jurisdiction of Panama over Panamanian flag vessels entering United States ports and could jeopardize the continued participation of Panamanian flag shipping in international commerce.

Although the instant case involves a Liberian flag vessel, this Court's decision will undoubtedly affect other foreign flag vessels such as those of Panama. Panama's interest is particularly direct because at this very moment the National Labor Relations Board has pending before it the question of its jurisdiction over three Panamanian flag vessels and their alien crew members. *Reynolds Metal Co. and Caribbean S.S. Corp., S. A. (International Maritime Workers Union)* (Cases Nos. 2-CA-7908, 2-RC-11278, 2-RC-11320). Furthermore, that Board recently asserted jurisdiction in another case involving a Panamanian flag vessel (*Eastern Shipping Corp.* 132 NLRB No. 72 (1961)). The New York Court of Appeals in the instant case relied upon the Board's exercise of jurisdiction in the

Eastern Shipping Corp. case and related foreign flag cases in reaching its conclusion that the dispute in the instant case was "arguably subject" to the Labor Board's jurisdiction.

Panama is most anxious to prevent any further usurpation of its sovereign rights over the internal affairs of its vessels, and to protect and maintain its exclusive jurisdiction and control over the seamen employed on such vessels, under generally recognized principles of international law.

The International Court of Justice in its Advisory Opinion of June 8, 1960 (*IMCO Constitution of The Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005) recognized Panama to be the eighth largest shipowning nation in the world as of 1958. Panama has now dropped to twelfth position, largely as a consequence of the uncertainties as to the lawful limits of the American Labor Board's jurisdiction over foreign flag vessels.

Panama thus has a very real and direct interest in the clarification by this Court of the jurisdictional limits of the National Labor Relations Board. Panama therefore wishes to present its views to this Court and to call the Court's attention to certain established principles of international law and comity, the consideration of which is essential to the proper determination of jurisdictional rights as to foreign flag vessels. Panama believes that, possibly because of emphasis on other points, such principles of international law and comity were not fully developed and presented in the courts below, and doubts that they will be adequately developed and presented by the parties here.

For the foregoing reasons, the Government of Panama respectfully requests that this motion be granted.

Dated: June 28, 1962

Respectfully submitted,

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IN THE

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE REPUBLIC OF PANAMA AS *AMICUS CURIAE*

Statement

The Republic of Panama's interests in the instant case are important. Its sovereign jurisdiction over Panamanian flag vessels and the continued existence of the present Panamanian Merchant Marine would be immediately and seriously threatened if the basis claimed for the National Labor Relations Board's jurisdiction in the present dispute were upheld by this Court. It is the position of the Republic of Panama, as well as

that of the Petitioner, that under controlling principles of international law, the National Labor Relations Board's jurisdiction cannot extend to the labor relations of foreign flag vessels, as such matters fall within the exclusive sovereign jurisdiction of the flag State. Accordingly, the "arguably subject" doctrine as to the Labor Board's jurisdiction, relied upon by the New York Court of Appeals, must be confined to domestic industrial strife between American employers and employees; it has no application in the instant case.

The New York Court of Appeals decision, if sustained, would give rise to continuous conflicts between the United States and the foreign flag States which now exercise jurisdiction over labor relations on such vessels. It would serve to disrupt the free flow of international commerce and undermine the friendly relations between the United States and such foreign States as Panama.

The fundamental rules of international law, relied upon here, as well as the practical objectives of international commercial relations, require that the United States recognize the foreign State's sovereignty over the internal affairs of vessels of its flag, and that the United States refrain from the assertion of conflicting laws, regulations and controls over such vessels.

ARGUMENT

1. The United States Should Not Attempt to Regulate Labor Relations Which Are the Primary Concern of a Foreign Country.

The Republic of Panama submits that the decision of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), should be controlling here. As this Court held, after reviewing the legislative history of the Labor Management Relations Act, "what was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 353 U. S. at 144. This holding precludes application of the Act to the foreign seamen on foreign flag ships.

Panama further submits that any attempt by the United States to project American labor laws on board foreign flag vessels would constitute a direct violation of international law and an infringement of the exclusive sovereign jurisdiction of the flag State over labor relations on such vessels.

Panama, in particular, considers any attempt by the United States to apply its labor laws to Panamanian flag vessels as constituting a direct offense to the sovereign rights of Panama to govern all such matters concerning the internal affairs of its vessels. The Panamanian Labor Code governs the employment of crews, seamen's contracts and all matters of labor relations on board Panamanian flag vessels, and all controversies arising with respect to such labor relations are subject to the jurisdiction of Panamanian labor courts. Panama's impressive body of labor laws regu-

lates such important areas as representation of seamen by unions, formation and organization of unions, permissible activities of unions, strikes, requirements of collective bargaining agreements, minimum age requirements, working hours, wages and overtime, vacations, and the care of sick and injured seamen.[1] Many of the provisions of the Panamanian labor laws conflict with and cannot be reconciled with the Labor Management Relations Act. Panama considers that it is not only its sovereign right but also its duty to regulate and control labor relations with respect to its vessels. Panama's jurisdiction over such labor relations is its exclusive prerogative.

The Government of Panama's refusal to recognize the National Labor Relations Board's arbitrary assertion of jurisdiction over Panamanian flag vessels, has been made clear by protests to the Department of State of the United States with respect to the case of *Eastern Shipping Corp.*, 132 NLRB No. 72 (1961). Similar representations were made by Panama with respect to the case of *Reynolds Metal Co. and Caribbean S. S. Corp. S.A.* (NLRB Cases Nos. 2-CA-7908, 2-RC-11278, 2-RC-11320), now pending before the Board.

Such laws as those of Panama governing labor matters on its flag vessels, are in perfect accord with the established principles of international law, as well as international custom, whereby civilized nations throughout the world recognize the vessel's nationality

[1] Labor Code of the Republic of Panama, especially Title XII and Art. 339 (Law No. 67 of November 11, 1947, and Law No. 7 of January 26, 1950, of The National Assembly of Panama). See also Manual for Masters and Seamen on Ships under the Panamanian Flag, at p. 120 *et seq.* (1949) and Supp. No. 1 (1950), by Carlos Berguido, Jr. and Jorge Fabrega for English translations of the Labor Code's governing provisions.

as that of the flag State and defer to the flag State's exclusive sovereign jurisdiction over all matters relating to the vessel's internal economy, including labor relations.

2. A Vessel's Flag Determines Her Nationality and the State With Exclusive Jurisdiction Over the Vessel's Internal Affairs.

The historical and universal rule of international law is that the vessel's nationality is determined by its flag.[2] No other method has yet been developed for determining nationality which seems either certain, practical, or consonant with established principles of international law.

The most recent authority in support of this rule is the Advisory Opinion of the International Court of Justice in the *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005 (June 8, 1960). See also *The Muscat Dhows Case (France v. Great Britain)* (1905), The Hague Court Reports 93, 96, 99 (Scott ed. 1916); Rienow, The Test of the Nationality of a Merchant Vessel 42-49, 73-78, 79-116, 187, 214, 218-219 (1937).

This rule was also adopted in such important maritime conventions as the Safety of Life at Sea Convention of June 10, 1948 (3 U. S. T. 3450; T. I. A. S. No. 2495) and the Load Line Convention of July 5, 1930, (47 Stat. 2228; T. S. No. 858), to which the United States and Panama, among other nations, are parties.

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[2] Technically registry determines nationality, and the flag is evidence of such nationality. However, customary reference is made to the flag as determining nationality, which implies proper registry. See Starke, Introduction to International Law, 209, n. 2. (4th ed. 1958).

And this Court has constantly recognized the vessel's nationality as determined by its flag. As the Court stated in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 584:

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it."

Underlying the rule that ships have the nationality of the flag State is the basic principle of international law that jurisdiction over the vessel's internal affairs belongs exclusively to the State of the vessel's nationality.

The flag State's jurisdiction over the internal affairs of the vessel is well recognized by American judicial decisions.

As stated in the *Wildenhus's Case*, 120 U. S. 1 (1887) at 12:

> "[I]t was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

See also *St. Clair* v. *United States*, 154 U. S. 134, 152 (1894); *United States* v. *Flores*, 289 U. S. 137, 156-157 (1933); *Evangelinos* v. *Andreavapor Cia., Nav., S. A.*, 162 F. Supp. 520, 521 (S. D. N. Y. 1958).

The United States Government has consistently supported the international rule that ships have the nationality of the State whose flag they are entitled to fly. In fact, this rule and the rule of jurisdiction of the flag State over such ships, formed the basis for the United States support of the position of Panama and Liberia before the International Court of Justice in the proceedings relating to the above mentioned *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005. (Letter from U. S. Under Secretary of State, dated October 27, 1960, to the U. S. Attorney General, requesting that the United States file a brief *amicus* with the National Labor Relations Board in connection with the foreign flag cases then pending, in order to present the views of the Department of State. This letter is printed as Appendix A to the Brief of the United States, Intervenor as Amicus, dated November 1960, which was then filed with the Labor Board in the *Eastern Shipping Corp.* case and related cases (NLRB Cases Nos. 12-RC-415, 15-CA-1454, 12-CA-255, 2-RC-10379).)

Historically, the flag State's right to exercise exclusive jurisdiction over the internal affairs of its vessels was premised upon the theory of territorial extension; that is, the vessels were considered as part of the territory of the flag State.

However, this theory of territoriality has now largely given way to general acknowledgment of the flag State's jurisdiction for reasons of practical necessity.

As this Court pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 585:

> "Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her."

Again, in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), this Court appeared mindful of the practical necessities of applying the constant law of the flag. The truisms there summarized have equal applicability to the instant case:

> "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." *Id.* at 384.

See also *The Fletero* v. *Arias*, 206 F. 2d 267, 272-273 (4th Cir. 1953).

The law of the flag has long provided a ready standard for determining the vessel's nationality and, through such nationality, the responsibility for and authority over the vessel. Without such an easily determined and fixed standard, the maritime nations of the world would have no generally acceptable yardstick by which to ascertain the nationality of the vessels and the sovereign authority over such vessels entering their ports. If the judicial and administrative agencies in Panama, Italy, Great Britain or other countries should refuse to recognize the nationality of foreign flag ves-

sels entering their ports, and in denying such recognition, seek to apply their own varying labor laws, it is not difficult to imagine the resulting constant conflicts as to jurisdiction which would have a withering effect upon international maritime commerce.

The practical considerations which support the exclusive jurisdiction of the flag State are not only present while the ship is in the foreign ports of the world but also while it is on the high seas. Practical necessity again requires that the applicable law which is to govern labor relations on board the vessel must be determined by a precise standard which is recognized by all nations since labor relations involve a continuing relationship between the master and crew at all times and wherever the ship may be.

Thus, throughout history the nations of the world have found it to their practical advantage to defer to the law of the flag State as the law to govern the internal management and labor relations on foreign flag vessels. This traditional restraint in the exercise of jurisdiction has served well to advance the mutual desires of all States for reciprocal recognition of their sovereign jurisdiction over their own flag vessels both on the high seas and in foreign ports, and to foster amicable and workable international commercial relations among all nations.

3. The American Contacts of Foreign Flag Vessels Are Neither Certain Nor Practical as Jurisdictional Standards to Govern Labor Relations on Such Vessels.

It was suggested by the Court below that so-called "contacts" of the foreign flag vessels with the United States should determine whether or not the American Labor Board had jurisdiction over such vessels under

the Labor Management Relations Act. We submit that any construction of the Act which would require its applicability to be determined by American contacts of the foreign flag vessels would prove to be wholly impractical and unrealistic. Consider, for example, the following American contacts:

(1) *Engagement in Commerce with the United States.* Suppose the Labor Board's jurisdiction were premised upon the foreign flag vessel's engagement in commerce with the United States or the percentage of calls at United States ports. What then happens when the vessel's passenger or freight routes are changed so that the vessel thereafter is continually engaged in trade solely between foreign ports? Foreign flag vessels are engaged in international shipping; the trade routes of a particular vessel change frequently, even from month to month, according to the dictates of international trade. A foreign passenger vessel engaged today in regular runs to New York, may tomorrow commence a regular "shuttle" service solely between Great Britain and Canada. Similarly, the foreign flag tanker now engaged in regular trade between the United States and Venezuela, may tomorrow be engaged in regular trade between Great Britain and the Persian Gulf. Are the applicable labor laws to change with the trade routes, as the "contacts" test would imply? To apply American labor laws on such vessels may well be to impose continuing regulation of the labor relations of vessels which, while in American ports momentarily, may spend most of their useful life in foreign waters.

Moreover, as this Court pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 581:

> "Respondent places great stress upon the assertion that petitioner's commerce and contacts with

the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

(2) *An American Agent.* If the assertion of jurisdiction is to be in any way based upon the fact that the General Agent for the foreign flag vessel is American, then would not foreign nations be warranted in establishing similar tests and applying their own labor laws and regulations to American flag shipping lines which had subsidiary offices or agents within their territorial boundaries?

(3) *Stock Ownership.* It is sometimes suggested that if American citizens own a majority interest (51%) in the shipowning company, there is a basis for Labor Board jurisdiction. Yet this basis of asserting jurisdiction is wholly impractical. Stockholders' interests are subject to constant fluctuation. In many instances stock ownership is also difficult to ascertain. Shares may be held by nominees, or as bearer shares, or may be listed on foreign exchanges. Stockholders' control may also be difficult to measure, especially when there are various classes of voting, limited voting, and non-voting Common Stock issued to U. S. and foreign nationals. Preferred Stock (with various pre-emptive and/or conversion rights) and Convertible Debentures may be outstanding. Stockholders' rights may be affected by voting trusts, creditors' rights, pledges, escrow agreements, etc. Facts which would be difficult

to catalogue, ascertain and measure do not furnish a practical basis for determining jurisdiction over foreign flag vessels. (See Advisory Opinion of the International Court of Justice in the *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005 (June 8, 1960).)

(4) *Nationality of the Crew.* In the foreign flag cases now pending before this Court, the vessels' respective crews are all foreign nationals. The crew of any foreign flag vessel may be, and often is, a mixture of nationals, such as British, Greek, Dutch, Italian, German and Norwegian. Moreover, the crews may change from voyage to voyage or from port to port. If the United States is to assert labor jurisdiction over the foreign members of such crews, then each of the foreign States represented on the crews would logically be justified in asserting jurisdiction over American seamen on American flag vessels entering its ports.

International law has long been aware of the varying diversity of crew nationalities, and, as this Court recognized in *In re Ross*, 140 U. S. 453 (1891), the nationality of the vessel for jurisdictional purposes is attributed to all members of her crew. Also, to borrow from *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953), a foreign seaman's presence in the United States is "transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another."

(5) *The Contract of Employment.* To invoke the place of contracting as a basis for asserting jurisdiction would, as pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571, 588-589 (1953), be placing reliance upon a purely fortuitous contact with a particular country. A ship

takes on members of a crew in any port where it needs them. Therefore, seamen's contracts of employment are often concluded in many different countries. A ship could be subjected to a multitude of systems of law if the *lex loci contractus* were to govern. Thus, in international shipping the natural tendency is to incorporate into articles of employment the more constant law of the flag as governing seamen's employment, as this Court noted in *Lauritzen* v. *Larsen, ibid.*

In sum, the above-mentioned tests, and any combinations thereof, are neither constant, certain nor practical as jurisdictional standards with respect to labor relations on foreign flag vessels. To base jurisdiction upon any such standards would not only fail to solve the present issue, but would also create an untold number of new ones. International practices and international jurisprudence demonstrate that the assertion of such standards for the purpose of interfering with the flag State's sovereign jurisdiction over the vessel has been considered and rejected. The general acceptance of the flag State's law as governing civil matters, including labor relations, on board the vessel is based upon the simple fact that this law is constant, practical and certain in its application, wherever the vessel may be.

4. The Labor Management Relations Act Should Not Be Construed to Violate the Law of Nations.

The Labor Management Relations Act should not be construed in such a manner as would impute to the United States Congress a deliberate attempt to violate the long standing principle of international law upholding the flag State's jurisdiction over the internal affairs of its vessels.

As Chief Justice Marshall early declared in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804):

> "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."

This venerable canon of statutory construction was recently reaffirmed by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 577:

> "By usage as old as the Nation, such statutes [shipping laws of the United States] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."

See also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 381-383 (1959); *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285 (1949), and 1 Hyde, International Law Chiefly as Interpreted and Applied by the United States 727 (2d rev. ed. 1951).

The basis for this traditional canon was succinctly explained by Mr. Justice Day in *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913) as "essential to the peace and harmony of nations. . . ."

We submit that the Court of Appeals of New York erred in applying the "arguably subject" rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), as to the "exclusive primary competence" of the National Labor Relations Board. The "arguability" here, if any, is as to whether the scope and reach of the Labor Management Relations Act extends to govern foreign flag vessels when, under international law, jurisdiction over labor relations on such vessels is vested in the foreign flag State. Since the United States Congress has indicated no intention

whatsoever to violate such jurisdictional rights of the flag State, the American Labor Board would clearly appear to be without such jurisdiction, *ab initio*. (*Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 144 (1957). See also *Foley Bros., Inc. v. Filardo*, 336 U. S. 281, 285-286 (1949).)

Any attempt by the United States to project the Labor Act on board foreign flag vessels so as to regulate labor relations can therefore justly be considered by the flag State to be an infringement of its sovereign rights, openly inviting protest and, possibly, retaliation.

As this Court forewarned in *Lauritzen v. Larsen* (345 U. S. 571 (1953) at 582):

> "[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

The Panamanian Government's protest to the United States Department of State on August 24, 1961, concerning the Labor Board's improper assertion of jurisdiction over a Panamanian flag vessel in the *Eastern Shipping Corp.* case, 132 NLRB No. 72 (1961), pointed out that if the United States maintains jurisdiction over labor relations on Panamanian flag ships entering its territorial waters, this may open the door to reprisals by Panama who could impose Panamanian laws on American flag vessels entering its territorial waters, including those embracing the maritime entrances of the Panama Canal.

Thus, this Court's expression of concern in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), was well justified:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Id.* at 147.

CONCLUSION

The flag State has sovereign and exclusive jurisdiction over the subject matter in this case. The jurisdiction of the National Labor Relations Board is therefore precluded.

Accordingly, the judgment of the Court of Appeals of the State of New York should be reversed and the cause remanded for further proceedings.

Dated: June 28, 1962

Respectfully submitted.

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LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,
against
INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOL, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENT TO MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE REPUBLIC OF PANAMA AS *AMICUS CURIAE*

Our motion for leave to file a brief as *amicus curiae*, on page 2, and our brief on behalf of the Republic of Panama as *amicus curiae*, on page 8, make reference to *Reynolds Metal Co. and Caribbean S.S. Corp., S.A. (International Maritime Workers Union)* (Cases Nos. 2-CA-7908, 2-RC-11278, 2-RC-11320), which cases are stated to be pending before the National Labor Relations Board. We have just been advised that under date of December 21, 1961, the Union requested leave to withdraw its representation petitions in Cases Nos. 2-RC-11278 and 2-RC-11320 and its unfair labor practice charge in Case No. 2-CA-7908. Such requests were granted by the NLRB Regional Director (Second Region) in Cases Nos. 2-RC-11278 and 2-RC-11320 on December 28, 1961, and in Case No. 2-CA-7908 on December 29, 1961. The Labor Board therefore no longer has these cases pending before it.

Dated: July 5, 1962

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

AND

BRIEF OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO, hereby respectfully moves for leave to file a brief as *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for petitioner was requested but refused.

The interest of the Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO, in this case arises from the fact that it was a party to and the initiator of the National Labor Relations Board proceedings which resulted in the decisions of the National Labor

Relations Board in *Peninsular & Occidental (P & O) Steamship Company*, 120 NLRB 1097, 42 LRRM 113 (1958); *West India Fruit & Steamship Company*, 130 NLRB No. 46, 47 LRRM 1269 (1961); *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961) and *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961). The *West India Fruit & Steamship Company* case and the *Peninsular & Occidental Steamship Company* case are currently pending before the United States Court of Appeals for the Fifth Circuit, and that Court has postponed hearing and oral argument of these causes until after the decision of this Court is rendered in this instant case. These two cases in the U.S. Court of Appeals for the Fifth Circuit are *West India Fruit & Steamship Company, Inc., petitioner*, v. *National Labor Relations Board, respondent*, No. 18,929, C.A. 5; and *National Labor Relations Board, petitioner*, v. *Peninsular & Occidental Steamship Company and Green Trading Company, respondents*, No. 19,451, C.A. 5. The cases before the United States Court of Appeals for the Fifth Circuit and the instant case all involve the same issue of law concerning the jurisdiction of the National Labor Relations Board under the National Labor Relations Act over Employers operating foreign-flag vessels in the foreign commerce of the United States.

Since the instant case involves a foreign-flag vessel which is not owned by American citizens, either directly or indirectly, whereas the cases pending in the United States Court of Appeals for the Fifth Circuit in which movant is interested do involve vessels owned and controlled by United States citizens and transferred from the American flag to a foreign flag-of-convenience, it is reasonable to expect that the arguments in support of the jurisdictional reach of the National Labor Relations Act to the operations of American ship owners who nominally register their vessels with foreign nations while continu-

ing to operate in the American economy will not be fully presented by either party. In addition, movant would like to present to the Court for its consideration, arguments concerning the legislative history of the National Labor Relations Act, as amended, which are not referred to in the decisions of the courts below and which may not be presented to this Court if the parties pursue their same course of argument to this Court as they did below. These arguments concerning the legislative history of the Act and concerning the jurisdictional reach of the Act to cover American-owned and American-operated vessels flying foreign flags-of-convenience bear directly upon the basic issues in this case and may be dispositive thereof.

Respectfully submitted,

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BRIEF OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, AS AMICUS CURIAE

The most significant development during the past decade in the maritime industry has been the formation of a gigantic fleet of vessels nominally registered in and flying the flags of certain small foreign nations (principally Panama, Liberia and Honduras) but owned, controlled and operated outside the economy of the flag nation by nationals of other, larger nations, principally the United States. This fleet has grown to the point, for example, where today Liberia, a small nation with an agricultural

economy and minuscule foreign trade, possesses the largest and most modern tanker fleet in the world.[1]

This remarkable growth of the PanLibHon fleet, as it is called in the industry, is largely accounted for by the transfer of vessels from the American flag to PanLibHon flags-of-convenience and by the registering of new vessels, constructed abroad, belonging to American nationals with PanLibHon nations. Thus, it is estimated that from forty to fifty per cent of the PanLibHon fleet is in fact owned and controlled by American interests.[2] These vessels nevertheless continue to serve largely American commerce; they have virtually no connective link with the nation of registry. As a direct consequence, approximately 33,000 seaman's jobs formerly held by American seamen in American foreign commerce are now filled by foreigners under wage rates and working conditions vastly lower than American standards. Employment on American-flag vessels has dropped sharply from 158,860 positions in 1945, to 84,300 in 1951, to 57,507 in 1955, and to 49,281 in 1960.[3] Working conditions on board these PanLibHon vessels are, in many instances, redolent of the old "glory holes" prevailing in the American merchant marine before union organization and remedial legislation became effective.

For these reasons the Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO (hereinafter referred to as SIU) is vitally concerned as an

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[1] Whereas the American tanker fleet, which ranks fourth in the world, is 58% composed of obsolete vessels over 15 years old the Liberian tanker fleet is predominantly (57%) under five years old. OEEC, *Maritime Transport* 1960 (May 2, 1961), at p. 53.

[2] OEEC, *Maritime Transport* 1960 (May 2, 1961), at p. 53. Apparently American oil companies, in particular, have promoted the move to flags-of-convenience. OEEC, *Study on the Expansion of the Flags of Convenience Fleets*, at pp. 4-5 (Jan. 31, 1958).

[3] *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet before the Subcommittee on Merchant Marine*, 85th Cong., 1st Sess., at p. 715 (1957).

American labor organization representing seamen not only with the growth of this flag-of-convenience fleet but with the fleet operators' concerted effort to resist union organization and to resist the National Labor Relations Board's assertion of jurisdiction in regard to such organizational attempts.

As early as November, 1957, the SIU invoked the jurisdiction of the National Labor Relations Board over a vessel beneficially owned by two American railroads which had discharged its American, union crew; changed its flag from American to Liberian; and then proceeded to operate as a cruise ship out of Florida ports in the United States foreign commerce substantially as it had been previously operating. After a full-scale hearing, and lengthy deliberation, the National Labor Relations Board in May of 1958 in a published and well-publicized decision[4] found that it had jurisdiction over such a vessel despite its foreign flag. Thereafter a secret ballot election was conducted in Miami and the SIU was duly certified as exclusive bargaining representative of the crew.

Petitioner, in the instant case, now asserts to this Court that the foreign flag of a vessel, of and by itself, precludes the application of the National Labor Relations Act to such a vessel. It is this contention which vitally and materially affects the cases pending in the United States Court of Appeals for the Fifth Circuit, referred to by the SIU in its motion for leave to file this brief as amicus curiae, and it is this contention by petitioner which the SIU, briefly and without duplication of the exhaustive arguments which will be made by both parties to this Court, would herein respectfully refute as follows:

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[4] *Peninsular & Occidental* (P & O) *Steamship Company*, 120 NLRB 1097, 42 LRRM 113 (1958).

(1) The United States clearly has the power to apply its labor laws to foreign-flag vessels operating in the commerce of the United States.

While this point is not disputed, and was recognized by the New York Court of Appeals below, its fundamental importance to the issues in this case should not be lost in the maze of contentions and considerations concerning the jurisdictional reach of the National Labor Relations Act. The basic fact remains that there is no overriding authority which flatly holds that the United States cannot apply U.S. labor laws to a vessel flying a foreign flag. The decisions of this Court in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 372; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 142; *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 124; and in *Wildenhaus's Case* 120 U.S. 1, recognize the power of Congress to apply its enactments to foreign-flag vessels operating in American commerce as beyond question.

(2) The pre-1959 legislative history of the National Relations Act establishes that Congress did not intend to exclude all foreign-flag vessels, ipso facto, from coverage of the National Labor Relations Act regardless of their predominant connection with the economy and commerce of this Nation and their lack of connection with the economy and commerce of any other nation.

Petitioner sets forth on pp. 27-29 of its brief examples where Congress has by express language applied its legislative enactments to foreign-flag vessels. It argues, from these examples, that where Congress intended a statute to apply to foreign-flag shipping it has expressly so provided, and where no such express coverage is contained in an act, the intent of Congress to exclude all foreign-flag shipping should be inferred.

While the simplicity of this argument is appealing, such a litmus-paper test is woefully inadequate and misleading. The argument is categorically refuted, for example, by the decisions of this Court in such cases as: *Brown* v. *Duchesne*, 60 U.S. 183; *Uvicac* v. *Jarka Co.*, 282 U.S. 234; *Lauritzen* v. *Larsen*, 345 U.S. 571; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354; *Marino Cooks* v. *Panama Steamship Co.*, 362 U.S. 365; *Cunard Steamship Co., Ltd.* v. *Mellon* 262 U.S. 100; and *Scharrenberg* v. *Dollar Steamship Co.*, 245 U.S. 122. In each of these cases this Court was called upon to decide whether an act of Congress which was expressly silent on the matter applied to a foreign-flag vessel. In each case the Court reached its conclusion concerning application, *vel non*, of the act based upon the purposes of the legislation, the particular nature of the foreign-flag operation involved, and all of the surrounding circumstances. In short, there is not and never has been such a simple rule as the one urged by petitioner that Congressional legislation does not apply to any foreign-flag vessel unless the legislation expressly provides otherwise. Instead, the inquiry in each case has been, as stated by Mr. Justice Holmes in *Uvicac* v. *Jarka Co.*, 282 U.S. 234, 249:

> "* * * not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them."

Petitioner also argues, somewhat inconsistently, that the language of the Maritime Labor Act, passed by Congress in 1938, three years after the National Labor Relations Act, shows that Congress did not intend to apply the National Labor Relations Act to any foreign-flag vessels, despite the broad language or "literally universal words"

of the NLRA. Thus, petitioner points to the fact that the Maritime Labor Act contained express language that its provisions should not apply to foreign-flag vessels and argues that since the policies of the NLRA and the Maritime Labor Act are similar, the express limitation contained in the Maritime Labor Act modifies, somehow, the broad language in the NLRA. It is respectfully submitted that such logic is obviously specious. The fact that both statutes were enacted within a few years of each other and that both concerned labor relations in the maritime industry shows that Congress was deliberate in its use of broad language in the NLRA and equally deliberate in its exclusion of foreign-flag vessels from the Maritime Labor Act. In other words, the explicit exclusion of foreign-flag vessels from the Maritime Labor Act supports the implicit inclusion of such vessels within the coverage of the NLRA where the circumstances of their operation and the policy of the Act would require their coverage. Congress, knowing full well how to exclude *all* foreign-flag shipping from the scope of its legislation, as shown by the MLA, chose not to make such a sweeping exclusion from the broad language of the NLRA.

Finally, the review of the NLRA's pre-1959 legislative history by this Court in the *Benz* case establishes that foreign registry, alone and by itself, does not exempt an Employer from the Act. The Court there concluded that the NLRA was intended to apply to "industrial strife between American employers and employees." Accordingly, the Court there did not limit its inquiry merely to the flag or registry of the *S. S. Riviera*, but stated significantly that:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the

laws of another nation. *The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.*" (Emphasis added.)

See, also, *Marine Cooks* v. *Panama Steamship Co.*, 362 U.S. 365, 371. In short, the flag or registry of the vessel was merely one circumstance considered and certainly not the conclusive one.

Indeed, virtually every time this Court, and other courts, have been confronted with petitioner's argument that the registry of a vessel alone is conclusive against application of general legislation, the argument has been rejected. *Lauritzen* v. *Larsen*, 345 U.S. 571, 582; *Romero* v. *International Term. Co.*, 358 U.S. 354, 382; *Marine Cooks* v. *Panama SS. Co.*, 362 U.S. 365; *Gerradin* v. *United Fruit Co.* (C.A. 2), 60 F. 2d 927, cert. den., 287 U.S. 642; *Navios Corp.* v. *Maritime Union* (Pa. S.Ct.), 166 A.2d 625, cert. den., 366 U.S. 905; *Bartholomew* v. *Universe Tankship, Inc.* (C.A. 2), 263 F.2d 437, 440-441, cert. den., 359 U.S. 1000; *Afran Transport* v. *National Maritime Union* (D.C. S.D. N.Y.), 169 F. Supp. 416 (cited with approval in *Marine Cooks*, 362 U.S. at 371, n. 12).

In lieu of petitioner's *ipso facto* flag contention, this Court and others in the cases cited have instead looked to all the points of contact or connecting factors between the vessel, this Nation, and other nations in the light of the policy of the Act involved. In short, it is each and every contact point, not merely the place of registry, which must be taken into consideration in determining the application of general legislation to vessels operating in the American economy and in American commerce.[5]

[5] The fact that foreign-flag shipping can have a very direct and severe effect not only on American foreign commerce but on its domestic economy

(3) The legislative history of the 1959 amendments to the NLRA establishes that Congress did not intend to exclude all foreign-flag vessels, ipso facto, from coverage of the NLRA.

On May 23, 1958, the National Labor Relations Board rendered its decision in *Peninsular & Occidental* (P & O) *Steamship Co.*, 120 NLRB 1097, 42 LRRM 1113, holding that the NLRA applied to a Liberian-flag vessel with predominant connections to the United States. The decision was duly and widely publicized not only in the general press but particularly in the industry.

At the same time, Congress was itself thoroughly familiar with the entire flag-of-convenience controversy. As this Court noted in 1953, it had already by that time become "common knowledge" that ship owners were seeking to avoid laws by resort to nominal foreign registrations eagerly offered. *Lauritzen* v. *Larsen*, 345 U.S. 571, 587. Repeated Congressional investigations and inquiries since at least 1952 established beyond denial that Congress by 1959 was completely and thoroughly familiar with the contentions of both American labor and American ship owners concerning the effect of such nominal foreign registrations. See, e.g., *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet before the Subcommittee on the Merchant Marine*, 85th Cong., 1st Sess. (1957); *Hearings before the Subcommittee on Merchant Marine*, 86th Cong., 1st Sess., (1959).

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as well is aptly illustrated by the injunction obtained against the 1961 nation-wide maritime strike under the emergency provisions of the NLRA, and as a sequel thereto, the appointment by Secretary of Labor Goldberg of a three-man review board to study the flag-of-convenience controversy. See *U.S.* v. *Marine Engineers* (CA 2), 48 LRRM 2937 and 48 LRRM 2605; N.Y. Times, Sept. 20, 1961; p. 47.

See also CCH Labor Law Reports Summary No. 169, July 26, 1962, where the Bethlehem Steel Corporation offered to place two American deck officers aboard its foreign-flag vessels for every one American officer displaced by automation on its American-flag vessels.

Thereafter, in September, 1959, Congress undertook perhaps the most thorough and sweeping review of NLRB jurisdiction since passage of the original Wagner Act in 1935. The consequence of this review, in which Congress certainly had before it the limits to which the Board had up until then asserted its jurisdiction, was the passage of the Landrum-Griffin amendments to the NLRA. Significantly, these amendments included a new Section 14(c)(1) to the Act which expressly and clearly stated that:

> "* * * Provided, that the Board *shall not* decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (Emphasis added.)

In brief, the SIU respectfully submits that Congress in passing Section 14(c)(1) to the NLRA confirmed and ratified the NLRB's ruling in its May, 1958, *P & O* decision. Certainly it is a fair assumption that Congress had actual knowledge of the Board's assertion of jurisdiction in *P & O*, not only from the press, but from its simultaneous study of the Board's assertion of jurisdiction and of the foreign-flag controversy. Had Congress considered that the Board had wrongfully applied the NLRA in *P & O*, the obvious solution was readily at hand—a clause withdrawing application of the Act to any vessel flying a foreign flag. Instead, Congress did exactly the opposite: it "froze" the jurisdiction of the Board as such jurisdiction had been asserted up to August 1, 1959, and also provided for even wider application of the Act in the future. As stated in Senate Report No. 187, 86th Cong., 1st Sess. (April 14, 1957),[6] one purpose of the Landrum-Griffin amendments was:

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[6] As reproduced in Vol. 2, U.S. Code Congressional and Administrative News (1957), at p. 2343.

"1. To require that the National Labor Relations Board exercise its jurisdiction to the full extent permitted by the commerce clause."

The SIU respectfully submits that if the NLRA is truly to be applied to the full extent permittted by the Commerce Clause, then surely the single factor of a vessel's nominal registry with a flag-of-convenience nation is not conclusive of the NLRA's application.

Conclusion

For the foregoing reasons, the SIU respectfully urges that this Court in review of this case reject the contention of petitioner that the flag or foreign registry of a vessel, alone and by itself, precludes the application of the NLRA in all cases. Such a rule would be unique and unrealistic. Rather, the application, *vel non*, of the Act should depend upon a weighing of all connective links between the vessel, this Nation, and other nations in the light of the over-all policy of the NLRA to promote the full and normal flow of this Nation's commerce. Since the evaluation of these various connecting factors is primarily a factual inquiry, it is finally submitted that the New York Court of Appeals was correct in applying the "arguably subject" rule stated in *San Diego Building Trades Council Unions* v. *Garmon*, 359 U.S. 236, 245, and that the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief as Amicus Curiae were served by mail this — day of August, 1962, upon Breck P. McAllister, Esquire, 2 Wall Street, New York 5, New York, counsel for Petitioner, Incres Steamship Company, Ltd., and upon Herman E. Cooper, Esquire, and H. Howard Ostrin, Esquire, 655 Madison Avenue, New York 21, New York, counsel for Respondents.

_____,

of Counsel.

(3642-6)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 469.

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

Questions Presented.

The two questions presented by petitioner Incres assume a critical fact which is not true, namely, that its two vessels come only "temporarily into American waters." This is in sharp contradiction to Incres' acknowledgment on page 21 of its brief to the New York Court of Appeals that the vessels are engaged in "substantial continuing American foreign commerce." No other description of the vessels' operations would be accurate. They are used exclusively in regular shuttle service between New York and Caribbean

ports with all voyages starting and ending in New York. The totality of Ineres' business originates in the port of New York.

It is also incorrect for Ineres to state in the questions presented that the facts are not in dispute.

Statement.

Parties.

Petitioner.

Nominally incorporated in Liberia, Ineres operates two luxury ocean liners, SS *Nassau* and MV *Victoria*, in the Caribbean cruise trade. Ineres' main operating office is at 39 Broadway, New York City, from where it manages its business in its own name and in the name of a New York corporation which it controls—Ineres Lines Agency, Inc. (herein "Ineres Agency") (R. 52, 266, 274).

Respondents.

IMWU is an American labor union formed to organize merchant seamen employed aboard "runaway" or "flag of convenience" ships, i.e., foreign flag vessels which do not operate in the trade of the flag nation and are owned by absentee interests which have no substantial connection with the flag nation (R. 190, 195, 198-200, 266, 274-275; Defs. Ex. E—Preamble, Article II).[1] Because favored countries for convenience registry are Panama, Liberia and Honduras, the word "Panlibhon" has been coined to denote convenience ships the world over (R. 20, 193).

Respondent Shannon J. Wall is the Executive Director of IMWU (R. 190).

The other respondents have not been served and do not appear.

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[1] An unprinted exhibit, a copy of which has been filed with the Court (R. 190, 283).

Pleadings.

Complaint.

The complaint alleges that on May 13, 1960, IMWU began to picket the *Nassau* with signs demanding recognition (R. 8). The Italian crewmembers who manned the vessel stopped working, "some in the hope of higher wages . . . others in fear of reprisal," and longshoremen stopped loading (R. 8).

These concerted activities are claimed to be unlawful because, *inter alia*:

(a) IMWU seeks to compel recognition although it "does not lawfully represent a majority of the crew," and it has made Ineres the "innocent victim of a jurisdictional dispute between rival unions" (R. 9).

(b) IMWU cannot be certified as bargaining agent "by either the National Labor Relations Board or the New York State Labor Relations Board" because neither state nor federal labor relations statutes "apply to foreign ships with foreign crews in any way" (R. 9).

(c) IMWU is interfering with the "internal management and relations of a foreign vessel" (R. 9).

Sweeping injunctive relief is prayed for, restraining IMWU from "interfering in any way with the operation and management" of the vessels and picketing "for any purpose" (R. 11).

Amended Answer.

The amended answer (R. 29-35) denies material allegations of the complaint although it admits that IMWU picketed and a majority of crewmembers voluntarily struck the vessels (R. 30, 32).

Five affirmative defenses are set forth alleging that the NLRB has exclusive jurisdiction over the controversy (R. 30-34); that IMWU's peaceful actions are protected by the constitutions of the United States and the State of New York, and by New York common law (R. 34); and that the labor dispute involved is not enjoinable under New York's "Little" Norris-LaGuardia Act (N. Y. CPA §876a) (R. 34).

Examining the Facts.

Incres' Ruse.

Incres alleged in its complaint and supporting affidavits purported facts subsequently proved untrue. They are revealing of the aura of foreignness that Incres has sought to cloak itself in from the outset of this litigation. Included among them are:

—Incres' principal office is in Monrovia and it has no office or place of business in the United States (R. 5-6, 12). The truth is that Incres has no office in Monrovia but maintains one in New York where its activities are centered (R. 52, 266, 274). At the trial, Incres' President and its counsel quickly dropped the fiction of an office in Monrovia and stated that Incres' principal office was in London (R. 36, 51). They carefully refrained, however, from any description of the dimensions of the alleged London office or what was done there. The Appellate Division of the New York Supreme Court concluded that the "de facto" home port of the vessels was Genoa (R. 269), and Incres now says that it "accepts" that finding despite the fact that the vessels' Liberian certificates of registry state that Monrovia is the home port (Plt. Exs. 1, 2; R. 37, 39, 234-235, 238-239).

—Crewmembers belong to an Italian union, and work under a union "approved" contract, and no dispute with them exists (R. 7, 13-14). The truth is, as conceded by the Captain of the *Nassau*, that Incres seamen belong to no union, are paid substantially less than Italian union scale and have serious differences with Incres (R. 152-154, 163-164, 156-158).

—Incres is the innocent victim of a jurisdictional dispute between an American and Italian union (R. 15). The truth is that no inter-union rivalry exists (R. 24, 158). IMWU's right to organize Incres' seamen is unchallenged by any union (R. 25, 193, 213).

Incres' New York Office.

Contrary to the fabricated image of a company with headquarters in Monrovia caught in an inter-continental union squeeze, the undeniable truth is that Incres' main operating office is located at 39 Broadway, from which the extensive activities involved in operating two large ocean liners in weekly 400-passenger cruises are largely controlled (R. 52-58).

Incres nominally "shares" this office with its namesake and alter ego, Incres Agency (R. 52, 54, 55), but the business of the line is conducted as a single integrated operation (R. 55). Incres and Incres Agency use a common letterhead under the heading "Incres Line" (R. 54, 55, 243); and that is the only name by which the master of the *Victoria* knew the company (R. 113).

Vincenzo Berlingeri, Incres' President and member of its Board of Directors (R. 59-60), resides in New York (R. 58) and maintains his office at 39 Broadway from which he transacts the business of the line (R. 52). He is also an officer and director of Incres Agency (R. 59-60). The

nominal President of Incres Agency is one Max J. Ransden Wolfson (R. 12), who considers Berlingeri his superior (R. 57-58). A striking demonstration of the unity of interest and relationship between Incres and Incres Agency is apparent in Wolfson's verification of the complaint and moving affidavit initiating this case, even though Wolfson claims no official connection with Incres (R. 12, 15).

From 39 Broadway, Berlingeri and Wolfson handle or oversee passenger bookings (R. 52-53), provisioning (R. 52-53, 55), arrangements for arrival and departure (R. 52-53, 55), inspections (R. 53), fueling (R. 57-58, 172, 175), advertising (R. 55), repairs (R. 57), cargo (R. 172) and other husbandry details (R. 172-175). Consultation between Berlingeri and Wolfson is commonplace (R. 56-8, 59).

A technical inspector employed by Incres to oversee certain extensive repairs on the *Victoria* maintains his desk at 39 Broadway (R. 81-82). Consular communications concerning documentation of the vessels and officers' licenses are also addressed to 39 Broadway (R. 43-44).

Labor relations matters are similarly dealt with from 39 Broadway (R. 53, 65, 115, 149, 150, 169), including discipline (R. 65-66), requests for promotion, and personal problems of crewmembers (R. 53). The masters of the *Nassau* and *Victoria* make weekly written reports to 39 Broadway which cover details of the voyage, including disciplinary problems (R. 65-66, 114). They also speak personally on these and all other phases of operations with either Berlingeri or Wolfson, depending on whom they see first (R. 65-66, 115, 169, 171). When crew replacements are required, they are either flown or transported to New York (R. 56). When IMWU began to organize the *Nassau* and *Victoria*, Berlingeri and Wolfson dealt with the union in New York (R. 203-207, 211).

Confronted with the palpable facts of its New York activities, Incres has sought to cling to its claim that it is a wholly foreign corporation by verbally disassociating itself from its domestic agency while at the same time attributing to the agency the manifold functions entailed in operating the steamship line (R. 52-53).

Corporate semantics, however, cannot conceal that Incres and its agency, cemented together by interlocking officers and directors (R. 59-60), conduct a single integrated operation in which the activities of one are indistinguishable from the activities of the other. While the integral quality of the relationship is fully established in the record, complete inquiry along this line was regrettably curtailed by Incres' objections, which we believe were erroneously sustained by the trial court (e.g., R. 54, 66, 82-83).

Incres Engages in United States Commerce Financed by American Capital.

The management and control of its affairs from New York are only one aspect of Incres' significant American contacts. Most important of all, Incres' extensive shipping operations are conducted almost entirely in United States commerce. The *Nassau* and *Victoria* sail exclusively in the Caribbean cruise trade with each voyage beginning and ending in New York (R. 64, 154). Each vessel completes approximately 30 weekly voyages in a cruise season (R. 64). The passengers are almost all Americans (R. 64). Realistically, the vessels are floating hotels for American vacationists from the New York area. The vessels have never been in Liberian or English waters (R. 64).

In addition to being entrenched in American commerce, the vessels are American financed. The trial disclosed

that a fleet mortgage for $4,000,000 covering the *Nassau* and *Victoria* is held by the Bank of America (R. 48). Because of the pressures of a forthwith trial, IMWU was unable to secure a copy of the mortgage in time to offer it in evidence. The mortgage, however, is a public document recorded and available for inspection in New York City in the office of the Deputy Commissioner of Maritime Affairs of the Republic of Liberia for the Port of New York, and judicial notice should be taken of its contents. The mortgage (Preamble, Par. 2, p. 1) confirms that Incres is engaged in United States commerce, describing its operations as:

> "Shipowner is engaged in the operation of the vessel S/S. '*Nassau*' between the City of New York and Nassau, and has contracted with a European shipyard for the conversion of the vessel M/S. '*Victoria*' into a cruise type of passenger vessel so that it may operate the same in lieu of the S/S. '*Nassau*'."

The mortgage also confirms the intimacy of the relationship between Incres and Incres Agency. Among other things, in a "Loan and Credit Agreement" which is part of the mortgage, Incres Agency undertakes to act as guarantor for repayment of principal and interest on the mortgage. The same person on the same day, one R. F. Barnett, executed the agreement and mortgage for Incres and Incres Agency.

A recorded amendment to the mortgage, dated September 11, 1959, is executed by Berlingeri, for both Incres and Incres Agency.

IMWU—Answer of American Maritime Unions to Flag-of-Convenience Threat.

IMWU was formed in 1959 for a two-fold purpose:

1. To organize and improve job conditions of seamen on flag of convenience vessels (R. 195; Defs. Ex. E-Preamble, R. 283).

2. By such efforts to reduce the depressive effects of their low wages and inferior conditions on the superior wages and conditions of American union seamen (R. 194-196, 216-218).

Since World War II, job opportunities of American seamen have been drastically curtailed and their power in collective bargaining weakened by the vast growth of flag of convenience fleets (R. 194). Available statistics show a continuous decline in employment on America flag ships from 158,860 in 1945 to 49,281 in 1958 (Note, *Panlibhon Registration of American Owned Merchant Ships*, 60 Columbia L. R. 711, 712, n. 13 (1960); *Hearings on Vessel Transfer, Trade-In, etc., before Committee on Merchant Marine*, at p. 715, 85th Cong., 1st Sess. (1957)), and a corresponding increase in tonnage of Panlibhon vessels from 1,745,048 gross tons in 1950 to 6,388,000 gross tons ten years later (Note, *The Flag-of-Convenience Fleet*, 69 Yale L. J. 498, 499, nn. 6, 8 (1960)). Savings in labor costs and taxes are generally conceded to be the motivating factors for the growth in Panlibhon fleets (Note, *op. cit.*, 60 Col. L. R. at 715). This Court took cognizance of the phenomenon in *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953):

> "... it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries."

The lure of foreign registration is reflected in the percentage decline of United States' oceanborne foreign trade carried in American bottoms from 49.2% in 1951 to 10.5% in 1960 (*Analysis of Participation of U. S. and Foreign Flag Ships in Oceanborne Foreign Trade of United States, 1937, 1948, 1951-60;* U. S. Dept. of Commerce, Maritime Administration, 1962 at pp. 6-7). In contrast, in 1960 almost 40% of our foreign trade was transported in ships of Liberian and Panamanian registry (*Ibid.*, at p. 4).

The wages of American union seamen employed in the Caribbean cruise trade on American flag vessels are well over three times that of Incres' seamen, and Incres competes directly with these American flag vessels in the Caribbean cruise trade (R. 195-6).

Incres' claim that IMWU seeks to put it out of business is unfounded. IMWU's Executive Director, Wall, testified that the sole objective of the organizing efforts was to raise the wages of Incres seamen because they were competing with American seamen in comparable employment (R. 216-17).

Under sharp cross examination Wall said that it would be to IMWU's advantage if there were no ships but American ships (R. 218). It is a truism of the labor movement that every union would be advantaged if the only employers were high-wage union employers. This in no way reflects upon IMWU's intentions with respect to Incres.

IMWU Organizes *Nassau* and *Victoria*.

IMWU began to organize the crews of the *Nassau* and *Victoria* in late January or early February 1960, with ITF[1] approval (R. 24, 28; 193). Within two months organ-

[1] An international confederation of transport workers' unions from sixty-two nations in the free world (R. 191).

izors succeeded in obtaining pledge cards from a majority of crewmembers (R. 21, 202-203).

At a meeting on April 13, 1960, Berlingeri informed Wall that he was reluctant to negotiate with IMWU because, among other things, he was fearful of the wage and other demands which would be made (R. 22, 204-205, 206-207). On April 29, 1960 IMWU served Incres with a formal written demand for recognition (R. 246).

When it became apparent that Incres would not voluntarily recognize IMWU despite its majority, the union determined to publicize the dispute, and on May 13 commenced to picket the *Nassau* (R. 23, 207). The picketing was at all times peaceful (R. 23, 160-161, 182), and the legends on the picket signs were truthful (R. 160). No more than two or three pickets walked at any one time (R. 160-161), and adequate personnel remained on board the vessels to insure their safety, the union cooperating in this regard (R. 165-166).

On May 16, 1960, IMWU filed unfair labor practice charges against Incres which are still being processed by the NLRB (R. 27, 203).

Summary of Argument.

The judgment of the New York Court of Appeals dismissing the complaint should be affirmed without considering the issue of whether the NLRB has jurisdiction over Incres' domestic cruise business. Board proceedings have been in progress against Incres since 1960 based on IMWU's unfair charges. An extensive investigation of the jurisdictional question has been conducted by the Board, and its decision is awaited. Since the Board has exclusive authority to determine its own jurisdiction "in the first instance," and administrative remedies have not

been exhausted, court review at this intermediate stage is barred. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Even if Board proceedings were not in progress, state as well as federal courts would be without power to adjudicate the dispute because it is "arguably" or "potentially" subject to NLRB regulation. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U. S. 173 (1962); *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245 (1959). *Interlake* and *Garmon* cannot be circumvented by claiming a "threshold" issue, since the Board has primary exclusive competence at the "threshold" also. *Myers* v. *Bethlehem Shipbuilding Corp., supra.*

Benz v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958) does not exempt all foreign flag ships from Board jurisdiction regardless of American connections. By stressing a tramp steamer's temporary and fleeting contacts with an American port, *Benz* supports Board rulings that application of the Act to foreign flag ships is to be determined by case-by-case evaluation of American contacts as compared to foreign contacts. *Benz* also supports the Board's conclusion that "where the Labor Act is involved, 'foreign commerce of the United States' is both an important and necessary contact. . . ."

Should the Court go beyond the preemption question into the substantive issue of whether the Act applies in this case, then we urge that Board jurisdiction over Incres would not involve extraterritorial application of the Act, since Incres operates as an essentially domestic enterprise in the commerce of this nation. Moreover, extraterritorial application of the Act is not objectionable because, as with anti-trust laws, Congress expressly intended that the Act apply extraterritorially to minimize burdensome effects on the foreign commerce of this nation.

Neither flag law, nor treaty law, nor any other principle of international maritime law, is an obstacle to assertion of Board jurisdiction. Congress has the unquestionable power to extend our laws to foreign flag ships engaged in the commerce of this nation. Board regulation will in no way impugn the Liberian nationality of the *Nassau* and *Victoria* which is determined by their flag, nor the right of Liberia to exercise the traditional authority of the flag nation in matters of registration, taxation, requisition, ship-board discipline, etc.

Finally, Board jurisdiction will result in a uniform national labor policy applicable to foreign flag shipping. The alternative is chaos with state courts of every coastal state in the nation at liberty to apply a multiplicity of conflicting and disparate state laws to the problem.

POINT I.

The New York Court of Appeals correctly held that this dispute must first be decided by the NLRB since administrative remedies have not been exhausted and the subject matter is "arguably" or "potentially" within Board jurisdiction.

Incres Has Failed To Exhaust Administrative Remedies.

On May 16, 1960, IMWU filed unfair practice charges against Incres alleging violations of Sections 8(a)(1) and (5) of the LMRA (29 U. S. C. §158(a)(1) and (5)) based on Incres' interference with and coercion of its employees and its refusal to bargain collectively with IMWU (R. 27, 203). The Board has conducted an extensive investigation of the merits of the charges and the underlying question of jurisdiction and a ruling is due.

From the earliest days of the Wagner Act, this Court has required that when charges are before the Board, the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, and then such review may be had only through the appropriate federal circuit court as provided in Section 10(e) or (f) of the Act (29 U. S. C. §160(e) or (f)).

A leading case so holding is *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), which vacated an injunction against the Board hearing unfair labor practice charges. The injunction had been obtained on the employer's claim that its operations were not within the interstate or foreign commerce of this nation. In authorizing the Board to complete its hearing, this Court held that the Board was exclusively empowered by Congress to hear and determine the controversy "in the first instance," and judicial authority could not be substituted. After the Board's decision issued, an appropriate circuit court would have full authority to review "all questions" pertaining to jurisdiction. The employer could suffer no harm in following this procedure, since under the scheme of the Act no penalty attaches to disobedience of a Board order until enforcement by a circuit court. To the same effect: *Newport News Shipbuilding and Drydock Co.* v. *Schauffler*, 303 U. S. 54 (1938).

This Court need go no further than the *Myers* case to affirm the New York Court of Appeals.

The Dispute between IMWU and Incres is "Arguably" or "Potentially" Subject to Board Jurisdiction.

Even if unfair practice charges were not pending, the subject matter of this dispute is "arguably" or "poten-

tially" subject to Board jurisdiction and therefore under the preemption rule of *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245 (1959): "States as well as federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

The "arguably subject" preemption rule of *Garmon* recently received strong reaffirmation by this Court in *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U. S. 173 (1962). There the Minnesota State courts had enjoined picketing by a trade union whose membership consisted predominantly, if not exclusively, of supervisors who did not fall within the coverage of the Labor Act. The Minnesota courts ruled that this type of union was not a "labor organization" as the term is defined in the Labor Act. The ruling was based on "persuasive evidence" in the record that the union itself "had steadfastly maintained in proceedings before the NLRB that it was *not* a labor organization" within the meaning of the Act.

This Court nevertheless found that past action by the NLRB raised the "arguable possibility" that the Board would find the union to be a "labor organization" subject to the Act; and on the strength of this possibility ruled that the Minnesota courts were without jurisdiction to adjudicate the controversy. Earlier preemption decisions of this Court are in accord, e.g., *Garner* v. *Teamsters, etc. Union*, 346 U. S. 485 (1955); *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1957); *Weber* v. *Anheuser Busch, Inc.*, 348 U. S. 468 (1955).

Ineres contends that the "arguably subject" rule first announced in *Garmon* is not applicable to this case because the issue here is not whether particular conduct is protected or prohibited under Section 7 or 8 of the Act, but the "threshold" question of whether the Act applies at all.

In making this contention, Incres misconceives the significance of *Garmon, Interlake, Myers,* and the other preemption cases. Moreover, the contention is not enhanced by the sweeping claim that the presence of the Liberian flag without more is an absolute prohibition to Board jurisdiction.

The "threshold" question of whether the Act is applicable at all, regardless of the type of conduct complained of, has frequently been raised in preemption cases. *Interlake* and *Myers* involved precisely this sort of issue. The presence of a "threshold" problem in those cases was held in no way to detract from the exclusive primary jurisdiction of the Board to hear and determine the dispute "in the first instance."

In *Interlake* this Court pointedly observed that the issue presented as to the meaning of "labor organization" within the contemplation of the Act was different from the issue in *Garmon* which was "whether certain activities were protected by §7 or prohibited by §8 of the Act." This difference, however, was held to be without significance on the question of the Board's exclusive jurisdiction (370 U. S. at 178):

> "We see no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§7 and 8 of the Act to substantive conduct. Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence."

The same reasoning applies with the same force to this case where the process is one of interpreting and applying the statutory definitions of "commerce" and "affecting

commerce," and, in general, delineating the jurisdictional scope and reach of the Act as to specific employers, their vessels and crews.

It can hardly be questioned that Incres in its complaint has charged IMWU with obvious unfair labor practices under Section 8(b) of the Act (29 U. S. C. §158(b)), i.e.: inducing a strike through "fear of reprisal"; seeking by picketing and otherwise to coerce or compel recognition; engaging in a jurisdictional dispute; and inducing work stoppages among secondary employees (R. 8-9). Exclusive Board jurisdiction over activities of this sort is beyond the "arguable"—it is certain.

On the other hand, if the allegations of the complaint prove baseless, as we contend, then it is obviously "arguable" or "potential" that IMWU is engaged in protected activity under Section 7 (29 U. S. C. §157), also within the exclusive competence of the Board.

The Attorney General in an *amicus* brief to the Board in *West India Fruit and SS. Co.*, 130 NLRB 343 (1961), specifically acknowledged the Board's primary authority to make the initial determination as to its own jurisdiction in foreign flag shipping cases:

> "It is elementary that the Board has the duty in the first instance of making the determination of whether the seamen and ships involved are employees and employers within the Act, and that the terms 'employee' and 'employer' in the Act 'draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.' *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403 (1947). To its task the Board must not only bring an appreciation of economic realities but is 'free to take account of the more relevant economic and statutory consider-

> ations' in determining whether or not the Act is applicable. *NLRB* v. *Atkins & Co., supra,* at 403."

Board jurisdiction has expressly been held "arguable," and the claim that a foreign flag is an absolute bar rejected in this case (R. 289), and in *Navios Corp.* v. *National Maritime Union,* 402 Pa. 325, 332, 166 A. 2d 625, 629 (1960), *cert. den.,* 366 U. S. 905 (1961); *Afran Transport Co.* v. *National Maritime Union,* 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); and *Atlantic Robin SS Corp.* v. *International Maritime Workers Union,* Docket No. 563, 636 (Tex. Dist. Ct., Harris Co., Jan. 13, 1961—not reported).

These holdings are far more persuasive than *Sociedad Nacional de Marineros de Honduras* v. *McCulloch,* 201 F. Supp. 82 (D. C. D. C. 1962), where Judge Holtzoff, adopting the absolute rule that the LMRA can never be applicable to a foreign flag ship, enjoined a scheduled Board election for crewmembers of the United Fruit Company's Honduran flag vessels which operate regularly between the United States and Central American ports and are used interchangeably with the same company's American flag vessels.

In a parallel case involving the identical facts but a different plaintiff, the Second Circuit reached the same erroneous result as Judge Holtzoff but expressly rejected the flag-law-governs-all rationale (*Empresa Hondurena de Vapores, S. A.* v. *McLeod,* 300 F. 2d 222, 231 (2d Cir. Jan. 12, 1962)):

> "The Board is right in saying the scope of its powers in respect of (seamen) is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere 'figure of speech' whose fictitious character was exposed long ago, *Wildenhus' Case,*

120 U. S. 1 (1887); *Cunard SS Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923)."

The same view was expressed by the Appellate Division in this case (R. 266, 267):

> ". . . the Liberian nationality of plaintiff and the Liberian registry of the ships should not be conclusive of the character of shipping involved. The National Labor Relations Board, in appropriate cases involving 'American' ships flying foreign flags of convenience has so determined, and the conclusions are entirely persuasive (*Peninsular & Occidental S. S. Co.*, 120 N. L. R. B. 1097 [1958]; *Eastern Shipping Corp.*, N. L. R. B. Case No. 12-RC-415 [1959], CCH-NLRB Decisions ¶56,698 [1959-1960]). So, too, has the United States District Court in this district (*Afran Transport Co.* v. *Nat. Maritime Union*, 169 F. Supp. 416 [Bryan, J.]), in an especially well-considered opinion, cited with evident respect by the Supreme Court in *Marine Cooks Union* v. *Panama S. S. Co.*, *infra*, 362 U. S. 365."

Compare: *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 127 (1917).

If the Board may exercise jurisdiction over some foreign flag ships, then certainly the issue is arguable in this case and for the Board to decide "in the first instance." The Board's recent decisions in the field underscore the widsom of the *Interlake*, *Myers* and *Garmon* approach to the problem, i.e.: *West India Fruit and SS Co.*, 130 NLRB 343, 47 LRRM 1269 (1961), *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRPM 1138 (1961); *Hamilton Bros.*, 135 NLRB No. 85, 48 LRRM 1740 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32, 49

LRRM 1777 (1962). Each of these cases required of the Board what this Court described in *Garmon* as "*ad hoc* inquiry into the special problems of labor management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration" (359 U. S. at 242). No uniform fact situation is discernible to which a generalized formula applies.

Foreign-flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros.*, and *Owens-Illinois*), or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular and Occidental* and *United Fruit*); or they may, as here, be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Eastern*). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade the same as Incres does (*Peninsular and Occidental* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); or they may tow barges loaded with pulpwood (*Owens-Illinois*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular and Occidental, Eastern, United Fruit, Owens-Illinois*).

In its most recent foreign flag decision, *Dalzell Towing Company, Inc.*, 137 NLRB No. 48, 50 LRRM 1164 (1962), the Board declined to assert jurisdiction over a Panamanian flag vessel even though it concluded that the vessel was operated as "essentially a domestic U. S. enterprise."

Nominal ownership of the vessel was held by a Panamanian corporation, but that corporation in turn was the "instrumentality" of an established United States shipping corporation, both corporations having common officers and directors, sharing the same office space, and operating as an integrated enterprise. Moreover, the Board found that in the year prior to the filing of the petition, the vessel was "chartered primarily to American shippers," and "a large majority of her voyages touched United States ports." Jurisdiction was declined on the ground that the United States contacts of the vessel were not "sufficiently substantial." The character of the shipping involved was determined by the business of the charterers rather than the business of the owner-operator, and the charterers could be anyone in the world charter market. Because of this "fortuitous element underlying the physical contacts of the vessel with the United States," the Board chose to "defer to the law of the flag." The *amicus* brief of the Republic of Panama curiously contains no reference to this decision.

From the foregoing review of recent Board decisions, we see that in each case the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether the foreign aspects of a particular case militated against the assertion of jurisdiction. To the Board's credit it has filled its decision-making role with courage and distinctive scholarship.

The Board's leading case, *West India*, handed down in the face of the combined opposition of three cabinet departments—Justice, State and Defense—is an outstanding opinion that speaks for itself as to the quality of the Board's dedication to the problem.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceived of its task in *West India* as "'ascertaining and valuing points of contact between the transactions and the governments whose competing laws are involved.'" (130 N.L.R.B. at 354). With respect to the Labor Act, the Board properly concluded that "'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*."

In employing the contacts test, the Board did not ignore flag doctrine or other principles of maritime or international law. It simply assigned to these factors their proper weight in the general reckoning. Incres and the *amicus* countries are highly critical of the contacts test because it cuts through fictions and verbalisms and emphasizes concrete operational facts. The test provides a rational, policy-oriented basis for resolving this controversy, and one for which the special competence of an administrative agency such as the Board is bound to develop many excellent refinements.

The contention that under the contacts test every foreign flag vessel which regularly touches our shores, including the *Queen Mary*, is subject to Board jurisidiction stems from a distorted view of *Lauritzen* upon which *West India* is grounded. *Lauritzen* requires that in "ascertaining and valuing points of contact" due regard must be had for the "competing" interests of foreign governments. A British flag vessel, owned by British interests, employing a British crew, and sailing regularly from the ports of Great Britain in the commerce of that nation, would unquestionably have superior contacts with that country than with the United States, even though the vessel

regularly calls at American ports. The Board would undoubtedly so hold.

As an example, in *Dalzell Towing Company, Inc.*, 137 NLRB No. 48, 50 LRRM 1164 (1962), the Board specifically stated that: ". . . the mere fact a ship visits U. S. ports sporadically or regularly does not alone determine whether or not the Act is applicable. The test is whether or not the shipping is that of this nation, rather than that of a foreign nation." A similar statement is contained in *United Fruit Company*, 135 NLRB No. 25, 49 LRRM 1138 (1961).

As for the suggestion that the contacts test will breed retaliation, certainly the *amicus* countries, including the Republic of Liberia, find nothing offensive in the desire of the crews of the *Nassau* and *Victoria*, predominantly comprised of Italian nationals, to improve their working conditions. Any reprisals against United States' shipping by the Republic of Liberia or other nations could stem only from venal motives such as the fear that the susceptibility of some Liberian flag ships to organizing efforts of American maritime unions will discourage new Liberian registrations and thereby curtail revenue from that source. In this regard, the Republic of Panama discloses the real objection to NLRB jurisdiction when it complains in its brief that Panama has fallen from eighth to twelfth in world standing as a ship owning nation "largely as a consequence of the uncertainties as to the lawful limits of the American Labor Board's jurisdiction over foreign flag vessels."

A genuine ground for protest would be present if assertion of Board jurisdiction were to constitute a challenge to the nationality of the *Nassau* and *Victoria* and the legitimacy of their registration under the Liberian flag. The Board in *West India*, however, expressly disavowed

any such intention or result in applying the Act to a foreign flag vessel.

If retaliation or the sanctity of nationality were genuine fears, then apprehension over the reaction of the Italian government should have prompted the Board to decline jurisdiction over the American based alien clerical employees of the Italian Lines in *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957). The nationality of neither the employer nor the employees was impugned by the Board's unchallenged assertion of jurisdiction in that case. The same would be true here.

In any event, in determining the jurisdictional reach of the LMRA, as the statute was enacted by Congress, the favor or disfavor of foreign nations is hardly a relevant factor. If Congress were motivated by vague anxieties of retaliation, it would have long ago eschewed enactment of immigration, custom, health and safety laws.

Over the years, a constant stream of protest has been issuing forth from foreign maritime nations critical of the various forms of regulation and control exercised by United States agencies over foreign flag shipping in our national interest. This protest has not deterred the enforcement of federal statutes, nor has it resulted in retaliation against United States flag shipping.

Examples chosen at random from the maritime pages of recent issues of the New York Times disclose such items as vigorous protest by Mexico against refusal of U. S. Coast Guard to permit a Mexican cruise ship to sail from New York harbor for safety reasons[1]; "concerted drive" by foreign nations against implementation of the Bonner Act by the Federal Maritime Commission, which is accused

[1] New York Times, December 23, 1961, p. 1; January 7, 1962 p. 87.

of seeking to regulate rate making and other practices of foreign flag shipowners in Europe as well as the United States[1]; announcement of Prime Minister Macmillan that he will use "any means, official or unofficial," to thwart efforts of the Federal Maritime Commission to regulate the affairs of foreign shipping conferences[2]; refusal of eight British shipping lines to produce documents subpoenaed by the Federal Maritime Commission[3]; charge by a Danish shipping concern that the United States' cargo preference laws are "balkanizing" the high seas.[4]

We agree with Incres and the *amicus* countries that the contacts test may apply on a reciprocal basis. Thus, if an American flag ship ever operated as an enterprise in the commerce of a foreign nation the way the *Nassau* and *Victoria* operate as a United States' enterprise, and if such American flag vessel were as devoid of American contacts as the *Nassau* and *Victoria* are devoid of Liberian contacts, we would have no hesitation in saying that the foreign nation would be at liberty to exercise the type of regulation over the ship that we are seeking to have the Board exercise over the *Nassau* and *Victoria*.

Benz Does Not Bar Assertion of Board Jurisdiction.

We have no quarrel with this Court's decision in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958). We disagree with Incres, however, that it rules out application of the Labor Act to all foreign flag ships regardless of the circumstances of their operations. *Benz* was rejected as a conclusive bar to Board jurisdiction by the New

[1] *Ibid.*, May 18, 1962, p. 62.
[2] *Ibid.*, May 9, 1962, p. 86.
[3] *Ibid.*, May 20, 1962, p. 73.
[4] *Ibid.*, July 7, 1962, p. 52.

York Court of Appeals in this case (R. 288); the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 332 (1960); the federal district court in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); and, of course, the NLRB in *West India Fruit and SS Co.*, 130 NLRB 343, 361-364 (1960).

To be sure, *Benz* did hold the Act inapplicable to a dispute arising on a foreign flag ship operated by a foreign crew under foreign articles which "erupted" while the vessel happened "temporarily" to be in an American port. The case involved a foreign tramp steamer, which, after one or two fleeting and haphazard contacts with an American port, became embroiled in a labor dispute between the master and crew in which American labor unions thereafter joined as partisans of the crew. After picketing was enjoined, the vessel sailed away and two years later had not touched an American port again. This Court stressed in its opinion the happenstance and fortuitous quality of the vessel's American contacts stating (353 U. S. at 142):

> "The only American connection was that the controversy erupted while the ship was transiently in the United States port and American labor unions participated in its picketing."

The distinctive feature of *Benz* that the vessel there had only a "temporary" or "transient" connection with an American port has been repeatedly recognized (R. 288; *Afran Transport Co., supra; Navios Corp., supra*).

In *Marine Cooks and Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this Court underscored this limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947, 29 U. S. C. A. §141 *et seq.* governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters."

Benz hardly warrants the conclusion that coverage of the Act is barred where, as here, the *Nassau* and *Victoria* operate almost exclusively in American commerce. As this Court has admonished, "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133 (1944).

Incres itself is cognizant of the critical significance in the *Benz* holding of the transient or temporary connection with American commerce. For this reason, in framing the questions to be presented on appeal, it felt constrained to take the position that its connection with American commerce is "transient" or "temporary," and that the labor dispute involved here took place while its vessels were "temporarily" in an American port.

For Incres to contend that its regularly scheduled round-trip voyages departing from and returning to the Port of New York constitute "transient" or "temporary" connections is to strangle all meaning out of these words. Without its New York business, Incres would be defunct. Its New York business is the totality of its operations.

It is the very nature of maritime commerce that the actual port time of a vessel is a relatively small fraction of its total operating time, but this in no way renders regular contacts of a vessel with a particular port "temporary." New York is the home port of the American flag liner

SS United States. During the cruise season the *Nassau* and *Victoria* are probably in New York as often as the *United States.* Incres was far more candid in its brief to the New York Court of Appeals where it acknowledged that it was engaged in "substantial continuing American foreign commerce."

The fact that the nationality of the crewmembers is Italian has no bearing on the initial question of the Board's primary competence to determine its own jurisdiction. Although non-resident aliens, they are still, in the words of the *Benz* opinion (353 U. S. at 154), "workingmen of our own country," and they are employed by an essentially domestic enterprise. The Act has always been held applicable in a non-discriminatory manner to aliens and American citizens even where employed by a foreign employer so long as such employer is engaged in the commerce of this nation. *Italia Societa per Azioni di Navigazione,* 118 NLRB 1113, (1957); *Brown Company,* 109 NLRB 173 (1954).

We do not read the generic reference in *Benz* to "American employers and employees" to mean that the Act is never applicable to non-resident aliens or to foreign employers who carry on their business in this country. When alien workers are employed by employers engaged in business in the United States, the aliens are, for the purposes of the Act, American workers, and they enjoy the same protection under the Act as citizen workers. By the same token, when an alien employer elects to engage in the commerce of this nation he should be bound by the same labor laws that apply to his American competitors. Congress could not have intended otherwise.

Thus the Act applies where an Italian ship operator, employing alien workers, engages in business in this country. *Italia Societa per Azioni di Navigazione, supra.*

POINT II.

Incres is an essentially domestic enterprise in the commerce of this nation and Board jurisdiction over its operations would not constitute an unwarranted extraterritorial application of the Labor Act.

Should the Court choose to go beyond the preemption question and consider the specific issue now before the Board of whether the Act applies to Incres, then we contend that it does. The remainder of the brief deals with this contention.

Incres Is Engaged In The Commerce Of This Nation.

We agree with Incres that the LMRA must be considered as a whole in its application to foreign flag ships. The fundamental purposes of the Act are "to promote the full flow of commerce" and safeguard it from "injury, impairment or interruption" by eliminating certain practices "which have the intent or necessary effect of burdening or obstructing" it (29 U. S. C. §§141, 151).

There can be no question that the weekly Caribbean cruises of the *Nassau* and *Victoria* originating and terminating in New York fall squarely within the Act's definition of "commerce" (Section 2(6), 29 U. S. C. §152(6), and see Appendix to Incres' Brief, p. 53). This definition is not "literally universal" as Incres suggests. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31 (1937), this Court pointed out that Section 2(6) specifically defines "commerce," and the definition "affecting commerce" in Section 2(7) (29 U. S. C. §152(7)) is "one of exclusion as well as inclusion."

Incres concedes that it is engaged in "commerce" and that its operations "affect commerce" as defined in the

Act. Incres further acknowledges that the sixty cruises completed annually by both vessels, together with the operations of Incres Agency, are a more than *de minimus* involvement in commerce. As already noted, Incres in its brief to the New York Court of Appeals admitted that it was engaged in "substantial continuing American foreign commerce." It remains therefore to consider whether there is any principle of maritime or international law which requires the denial of Board jurisdiction for which all statutory prerequisites have been met.

The Extraterritorial Question.

One of Incres' main contentions is that application of the Act to its operations would constitute an unwarranted extraterritorial extension. The view that the *Nassau* and *Victoria* are foreign territory is an illusion of such embarrassing proportions that after advancing it in an early portion of its brief, Incres later discredits it as a "fiction," and so does the Republic of Liberia. Controlled from operating offices at 39 Broadway, and servicing an American clientele, the *Nassau* and *Victoria* are nothing more than floating hotels in the tourist traffic of this nation. Incres and the Republic of Liberia as well as the other *amicus* countries do not question that when the *Nassau* and *Victoria* come weekly into the Port of New York they subject themselves to our laws. As this Court stated in *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 372 (1960):

> ". . . a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist."

A fuller statement of the same "generally recognized" principle is found in *Cunard SS. Co.* v. *Mellon*, 262 U. S.

100, 125 (1923), where quoting the words of Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144, this Court stated:

> "'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.'"

While accepting that the laws of this country, including presumably the LMRA, are applicable to the *Nassau* and the *Victoria* when they are in New York, Incres argues that when the vessels are in international waters, the Act ceases to apply. Since alternating application and non-application of the Act would be an absurdity, Incres contends that the Act may not apply at all.

If operation of a vessel in international waters were alone sufficient to preclude Board jurisdiction, then the Board would lack jurisdiction over American flag vessels. To avoid this implication, Incres resorts to the confessed invention that a ship is a floating portion of the nation

whose flag it flies. In Incres' view, therefore, application of the Act to the *Nassau* and *Victoria* while in international waters would constitute a forbidden extraterritorial extension.

To exempt Incres from its obligations under the LMRA simply because the *Nassau* and *Victoria* fly the Liberian flag, is to do much more than accord traditional respect to the foreign flag of a friendly nation, it is rendering abject obeisance and servile homage to the myth of a foreign power within the boundaries of our own country.

When an employer's business is so thoroughly entrenched in the commerce of this nation that from every point of factual reckoning it is an American business, then the metaphor of the ship—territory is scarcely a basis for excusing obedience to a statute of this country that is clearly applicable by its terms.

Laying aside these considerations, and assuming that the *Nassau* and *Victoria* are extraterritorial entities of some sort, it still does not follow that they are immune from the Act. For there can be no question that in regulating commerce Congress can and has extended the reach of our laws beyond the geographical boundaries of the nation.

Thus, in *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287 (1952), which involved extraterritorial application of the Lanaham Trade Mark Act (15 U. S. C. § 1051 *et seq.*), this Court stated that it did not matter that:

> "Petitioner affixed the mark 'Bulova' in Mexico City rather than here, or that his purchase of supplies in the United States to be used in his Mexico business when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of

> an unlawful scheme. 'In such a case it is not material that the source of the forbidden effects upon commerce arise in one phase or another of that program.' *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237. In sum we do not think that Petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders."

Perhaps the best known line of cases giving extraterritorial effect to United States laws are those involving the anti-trust laws: *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *United States* v. *Aluminum Co.*, 148 F. 2d 416, 444 (2nd Cir. 1945); *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633 (2nd Cir. 1956); *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (E. D. Ohio 1949), aff'd with modifications not here relevant, 341 U. S. 593 (1951); *United States* v. *R. P. Oldham Co.*, 152 F. Supp. 818, 822 (N. D. Cal. 1957); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504, 592 (S. D. N. Y. 1951).

In these cases, as in the *Steele* case, the application of our laws to conduct taking place in foreign territories is based on the prohibited *effects* of that conduct on the interstate and foreign commerce of this nation. In other words, when in regulatory legislation Congress establishes the "effects" upon United States commerce as the jurisdictional criterion, the courts do not hesitate to vindicate the Congressional purpose even where doing so may in a very limited and special sense require extraterritorial application of the statute.

In *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 641 (2nd Cir. 1956), the reach of the anti-trust laws was delineated as follows:

> "While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce 'with foreign nations or among the several states.' This power is now generally interpreted to extend to all commerce, even in intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. . . ."

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2nd Cir. 1945), a contract made outside the United States by foreign parties and purporting to operate only outside the United States was condemned on the ground that it was intended to and did restrain the foreign trade of this country. The court stated:

> "Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."

There can be no question, as we have shown, that the fundamental objective of the Labor Act is to eliminate practices which have the "effect of burdening or obstructing commerce," and "commerce" includes "trade . . . between any foreign country and any state. . . ." (29 U. S. C. 152 (6)). Necessarily, therefore, Congress must have envisioned that regulation under the Act would include the foreign commerce of the United States and to that extent the Act would apply extraterritorially. As this Court observed in *Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 222 (1938): ". . . it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion (for determining jurisdictional coverage of the Act)."

For this reason, the canon of construction upon which Ineres heavily relies that an act of Congress, "unless a contrary intent appears," will be presumed to apply only within the territorial jurisdiction of the United States is plainly inapplicable. To begin with, as this Court observed in *Foley Bros. Inc. v. Filardo*, 336 U. S. 281, 285 (1949), application of the canon is a "valid approach" in ascertaining "unexpressed" Congressional intent. But in the Labor Act, Congress has expressed its intent that the Act apply to both the domestic and foreign commerce of the nation to the end that certain deleterious effects on that commerce be eliminated.

Comparison of the jurisdictional provisions of the Eight Hour Law, which was involved in *Foley Bros., supra*, with those of the Labor Act, highlight the reason why the canon of construction was applicable there but not here. The Eight Hour Law (40 U. S. C. §325(a)) provides that the "wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract (between the United States and private contractors) shall be computed on a basic day rate of eight hours. . . ." *Foley Bros.* held the law inapplicable to an American citizen working under such a contract in Iraq and Iran on the ground that it could not be presumed that the literally universal jurisdictional coverage extended the law's regulation to the working conditions of foreign nations.

In contrast to the literally universal coverage of the Eight Hour Law, the jurisdictional coverage of the LMRA is limited to the commerce defined. Moreover, under the Eight Hour Law coverage is determined by the status of the individual, i.e., employment by a contractor engaged in fulfilling a government contract. Under the LMRA, coverage turns on the *effects* on United States commerce. An

employee could satisfy the literal jurisdictional requirements of the Eight Hour Law performing his entire service outside the territorial limits of this country, as was done in *Foley Bros.* For the Labor Act to be applicable, there must be trade between a foreign country and this country. Incres' vessels regularly touch United States shores.

If the purpose of the LMRA to eliminate harmful effects on United States commerce is to be realized, the Act must in the metaphorical sense be applied extraterritorially in instances such as shipping, where the very business involved is a moving instrumentality of foreign commerce. The test for such application ought not to be the specious one of the ship-territory, but whether the contacts of a vessel with United States commerce are so substantial in comparison with its competing contacts with other nations as to justify the Board in asserting jurisdiction. This is precisely the view taken of the problem by the Board in *West India* (*supra* p. 22).

Incres' statement that the canon of construction favoring territoriality has been consistently applied in construing "American labor legislation" does not survive scrutiny. The airlines cases cited to support the statement, i.e., *Airline Dispatchers Assn.* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951), *cert. den.*, 342 U. S. 849 (1951) and *Airlines Stewards & Stewardesses Assn.* v. *Northwest Airlines Inc.*, 162 F. Supp. 684 (D. Minn. 1958), aff'd. 267 F. 2d 170 (8th Cir. 1959), *cert. den.*, 361 U. S. 901 (1959), involved airlines employees who lived and worked entirely outside the United States. Their employment did not involve contacts with United States at any time. Moreover, the Railway Labor Act under which those cases arose, is expressly limited to activities within the United States.

Incres also cites *New York Cent. R. Co. v. Chisholm*, 268 U. S. 29 (1925) where the Court declined to extend the Federal Employers Liability Act to an accident which took place outside the United States but instead applied the "almost universal rule" that liability in tort actions is determined by the law of the place of the occurrence. This does not tell us anything about the scope of the LMRA which was fashioned to mitigate the effects of industrial strife on domestic and foreign commerce. In *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 377 (1932), this Court recognized the inapplicability of the *Chisholm* holding to the maritime industry stating: "We do not read the (Jones) Act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability on carriers by water."

In *Marine Cooks & Stewards v. Panama SS. Co.*, 362 U. S. 365 (1960), the Norris-LaGuardia Act was held applicable to picketing by an American labor union against a foreign flag ship.

Additionally, the Jones Act, maritime counterpart of the Federal Employers Liability Act, has in a number of cases been applied to accidents occurring in international waters on foreign flag ships. *Gerradin v. United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. den.*, 287 U. S. 642 (1932); *Gambera v. Bergoty*, 132 F. 2d 414 (2d Cir. 1942), *cert. den.*, 319 U. S. 742 (1943); *Rodriquez v. Solar Shipping, Ltd.*, 169 F. Supp. 79 (S. D. N. Y.); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S. D. N. Y.) (1953); *Carroll v. United States*, 133 F. 2d 690 (2nd Cir. 1943); *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959); *Babolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236 (S. D. N. Y. 1958).

The relevancy of Jones Act cases to the issue of application of the LMRA to flag of convenience ships was pointedly noted by the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960), *cert. den.*, 366 U. S. 905 (1961):

> "The appellants point out that it is the policy of the United States Government to recognize a vessel's foreign 'flag of convenience.' Since, however, this policy does not deter the Federal Court from looking behind such flags in cases involving federal regulatory statutes like the Jones Act, for instance, it may reasonably be inferred that neither should it deter the NLRB from looking behind such flags in cases involving the LMRA" (at 338).

Maritime Legislation Has Been Applied To Foreign Flag Ships Without A Clear Expression of Congressional Intent That This Be Done.

In support of its extraterritorial thesis, Incres at page 28 of its brief cites a number of United States laws in the area of immigration, customs and safety which expressly require application to foreign flag ships. Incres argues from this that the absence of an express reference to foreign flag ships in the LMRA manifests Congressional intent that they be excluded from coverage of the Act.

One immediate shortcoming with this argument is that the LMRA is not a maritime statute, it is a general labor law establishing and regulating certain rights and duties between employers and employees. It is unquestionably applicable to maritime employers and employees. *NLRB* v. *Waterman SS. Corp.*, 309 U. S. 206 (1940).

It is of no significance whatever that the LMRA does not expressly include foreign flag ships, for the Act contains no explicit inclusions of any category of employers or employees, although it does contain specific exclusions

(Sections 2(2) and (3), 29 U. S. C. §152(2) and (3)). In other words, the Act's jurisdictional coverage rests on the "effects" test, and it is a statute of general inclusion and only specific exclusion. If anything is meaningful about the silence of the Act regarding foreign flag ships, it is that the Act does not expressly exclude this class of employer or employee. As Mr. Justice Holmes commented in *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 239 (1931), where the Jones Act was held applicable to a suit by a stevedore injured on a German flag ship:

> "... the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them."

Aside from the absence of specific inclusions in the LMRA, Incres is simply incorrect when it implies that the only maritime legislation applicable to foreign flag ships is legislation which clearly expresses Congressional intent that it be so applied. There are many examples of maritime statutes which have been applied to foreign flag ships without clear expression of Congressional intent.

The Jones Act, 46 U. S. C. §688, is a perfect illustration of this. In *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2nd Cir. 1932), *cert. den.*, 287 U. S. 642 (1932), the Second Circuit stated in holding the Jones Act applicable to an American-owned foreign flag vessel:

> "If defendants' contention be sound, American owners and chartered owners of vessels can escape liability to American seamen employed on their ships by procuring registry under a foreign flag. We feel little doubt that the broad contention of the defendant that vessels of the American merchant marine are limited to those documented under the laws of the United States is not well founded" (at p. 927).

The following wage provisions of the Merchant Seamen's Acts have also been held applicable to foreign flag ships despite the absence of any clear expression of Congressional intent that this be done:

46 U. S. C. §593 dealing with payment of seamen's wages upon loss or wreck of a vessel. *Avgoustis* v. *Erini Shipping Co.*, 177 F. 2d 461 (2nd Cir. 1949);

46 U. S. C. §594 providing for payment of seamen's wages in case of improper discharge. *Avgoustis* v. *Erini Shipping Co., supra;*

46 U. S. C. §596 fixing the time for payment of seamen's wages upon termination of employment. *The Flatero* v. *Arias*, 206 F. 2d 267, 274 (4th Cir. 1953); *The Sonderborg*, 47 F. 2d 723 (4th Cir. 1931).

Similarly, the section in the federal shipping code providing for limitation of an owner's liability in the event of loss or damage to a vessel, as orginally enacted (9 Stat. 635 (1851)), did not contain any express reference to foreign flag vessels but was nevertheless held applicable to them. *The Scotland*, 105 U. S. 24 (1882). Subsequently this section was amended to refer to foreign flag vessels expressly, but this in no way reflected on decisions prior to the amendment (49 Stat. 960, 46 U. S. C. §183 (1935)).

The Maritime Labor Act.

Incres oddly finds support for its contention that the LMRA does not apply to foreign flag vessels in the fact that the Maritime Labor Act (MLA), 52 Stat. 965 (1938), repealed in 1943, is restricted by its terms to United States flag vessels. Incres argues that we can assume from this retriction an intention on Congress' part similarly to limit the LMRA.

We believe that the difference between the MLA and the LMRA implies precisely the opposite of what Ineres suggests. By expressly limiting the coverage of the MLA, Congress implicitly confirmed a broader coverage for the LMRA. Support for this is found in Section 1002 of the MLA (52 Stat. 965) which states:

> "The provisions of this title shall not in any manner affect or be construed to limit the provisions of the National Labor Relations Act. . . ."

The 1959 Amendment to LMRA.

Finally, a recent amendment to the LMRA practically requires the Board to assert jurisdiction over foreign flag vessels whose substantial contacts with American commerce outweigh their contacts with the flag nation or any other nation. Thus, in late 1959 Congress added the following proviso to Section 14(c)(1) of the Act (29 U. S. C. §164(c)(1)):

> ". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

On May 23, 1958, the Board had asserted jurisdiction over two Liberian flag ships which sailed between the United States and Cuba. *Peninsular & Occidental SS Co.*, 120 NLRB 1097. On December 11, 1958, the Board issued a decision that it would assert jurisdiction over all "freight enterprises engaged in the furnishing of interstate transportation services which derive at least $50,000 gross revenue per annum from such operations." *H. P. O. Service, Inc.*, 122 NLRB 394, 395 (1958). Congress presumably had knowledge of these cases when it enacted Section 14(c)(1).

Moreover, Congress was well aware of the rapid growth of flag of convenience fleets. *Hearings On Vessel Transfer, Trade-In, And Reserve Fleet Policies Before Committee On Merchant Marine, and Fisheries*, 85th Cong., H. R. 1st Sess. (1957). Indeed, almost contemporaneously with debate on the Landrum-Griffin amendments, the House Sub-Committee on Merchant Marine was holding hearings on foreign flag affiliations of subsidized American shipowners. *Hearings Before The Committee On Merchant Marine*, 86th Cong., H. R. 1st Sess. (1959).

While it is true that Section 14(c)(1) was directed primarily at filling the no-man's land created by *Guss v. Utah Labor Relations Board*, 353 U. S. 1 (1957), it is equally true that Section 14(c)(1) involved perhaps the most thorough and sweeping review of NLRB jurisdiction since the Board was created by the Wagner Act. It is a fair inference that in considering passage of this section Congress had before it the limits to which, up until that time, the Board had asserted its jurisdiction. We submit, accordingly, that Congressional failure to exclude from coverage of Section 14(c)(1) flag of convenience ships may well represent recognition of the appropriateness of the assertion of jurisdiction in *Peninsular & Occidental, supra*, and is therefore authority for the assertion of jurisdiction in this case.

With recent legislative history plainly favoring application of the Act to ships flying flags of convenience, and nothing in earlier legislative history negativing such application, the remedial design of the Act should be effectuated by sustaining NLRB jurisdiction.

POINT III.

Neither international maritime law, treaty law, nor any similar consideration bars assertion of Board jurisdiction over Incres' vessels.

Incres and the *amicus* countries set forth a number of alleged principles of international maritime law, comity and treaty law which they contend defeat exercise of Board jurisdiction. For the most part these "principles" are broad verbal generalizations or clichés such as a "vessel's nationality is determined by its flag." From phrases of this character Incres and the *amicus* countries claim to find in international law absolute prohibitions against assertion of Board jurisdiction in the foreign flag shipping field. They further contend that all organizing and protest activities of American maritime unions in the foreign flag sector are proscribed.

The Liberian Flag is Not an Absolute Bar to Board Jurisdiction.

The first contention made is that the presence of the Liberian flag and nothing more on the *Nassau* and *Victoria* is sufficient to oust the Board from jurisdiction. Thus Incres states in its brief:

> "We submit that the showing on this record that the two ships of petitioner are foreign flag ships is alone enough, under applicable principles of international maritime and treaty law, to defeat application of LMRA to those ships."

This claim advances a concept of absolute flag supremacy that is unknown to maritime law.

There is no question, as the Board observed in *West India*, that: "The United States with other maritime nations of the world, has as a principle of comity accepted the gen-

eral maritime law, including flag law doctrine. . . ." (130 NLRB at 353). Under this doctrine, nationality of a ship is evidenced by its papers and flag, the registering country determines for itself the "conditions on which it will grant its nationality to a merchant ship," and only the registering country can question the validity of a registration. There is no doubt also that the registering country acquires various aspects of authority over the vessel. *Lauritzen* v. *Larsen*, 345 U. S. 571, 584 (1953).

But all this has never been deemed to impose any limitations on the sovereign powers of Congress to legislate with respect to foreign flag vessels engaged in the commerce of this nation. As this Court stated in *Lauritzen* (345 U. S. at 592-3):

> "We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact."

As a matter of comity, the reach of our laws has at times been restricted to American flag vessels. But this is only a matter of comity and implies no inherent limitations on Congressional authority. *Wildenhus' Case*, 120 U. S. 1 (1887). The Jones Act cases (*supra*, pp. 33-34) perfectly illustrate the application of an American statute to occurrences on foreign flag vessels in international waters. As was stated in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929 (2nd Cir. 1932), *cert. den.*, 287 U. S. 642 (1932):

> "(I)t seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a ship owner who bears such an illusionary shield."

In short, when foreign flag vessels operate in the commerce of this country, this country shares authority over such vessels with the flag state. The extent to which this

country will assert such authority depends on a number of factors including the circumstances of the vessels' operations, the matter to be regulated, and the applicable statute. If the flag alone were the governing consideration, there would have been no need for this Court in *Lauritzen* to have enumerated contact points and connecting factors other than the flag. Similarly, in *Benz*, there would have been no need to emphasize the "temporary" or "transient" contacts with an American port.

While *Lauritzen* nominally attached "cardinal importance to the law of the flag," it nevertheless recognized that other contact points could outweigh the flag and expressly approved earlier Jones Act cases where the courts "pressed beyond the formalities of more or less nominal foreign registration" to enforce the obligations of "our law" (345 U. S. at 587).

Additionally, as the Board emphasized in *West India*, *Lauritzen* dealt with the Jones Act, and the contacts enumerated there reflect the problems arising under that statute. Other laws require emphasis of other contacts. In *Romero* v. *International Terminal Co.*, 358 U. S. 354, 382 (1959), this Court, while reaffirming the contacts criteria of *Lauritzen*, significantly admonished that, "due regard must be had for the differing interests advanced by the varied aspects of maritime law...." We are dealing here with a labor statute primarily designed to protect commerce, and which depends for its jurisdiction upon commerce. "Where the Labor Act is involved," said the Board in West India, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

Clearly, therefore, the naked fact that the *Nassau* and *Victoria* fly the Liberian flag is no obstacle to Board jurisdiction.

Application of the Labor Act to the *Nassau and Victoria* Will Not Detract From the Vessels' Liberian Nationality.

Intertwined with the claim of absolute flag supremacy, Incres and the *amicus* countries decry assertion of Board jurisdiction as somehow impugning the Liberian nationality of the *Nassau* and *Victoria*. The Board in *West India* expressly disavowed any such intention, stating that it accepted "without question" the Liberian nationality of the vessels and the paramount authority of Liberia over them (130 NLRB at 359):

> "The issue is whether the Liberian nationality of the vessel, *which we accept without question*, divests the Board of that jurisdiction it would have but for that foreign nationality. In finding that it does not, *we are not divesting or attempting to divest Liberia as the flag state of its paramount rights, for example, to control the movement of, to requisition, or to tax the vessel.* But there is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessel to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this Nation" (italics added).

The examples of typical consequences flowing from nationality contained in the quotation from *Oppenheim* at pp. 12-13 of the Republic of Liberia's brief would all be unaffected by the assertion of Board jurisdiction. Thus, while the *Nassau* and *Victoria* are at sea, Liberian law would determine the citizenship of a newly-born child, or the legality of a will or business contract. Liberia would similarly retain its authority to deal with crimes or disciplinary problems aboard the vessels. More important,

Liberia's authority to tax the vessels, control their registrations, fix standards of competence for unlicensed seamen and officers would all remain unaffected.

The nationality of a vessel is certainly no more sacred than the nationality of an individual. An alien visiting or doing business in this country is subject to our laws without his nationality being called into question. The same principle should apply to a foreign vessel which engages exclusively in the commerce of this country.

As we have shown, the concept of nationality as vesting in the flag state exclusive authority over a vessel has never been recognized in this country. Whenever the policies and welfare of this nation have called for it, Congress has not hesitated to extend our laws to foreign flag vessels. Of course, as a matter of comity, in those areas of authority where the affairs of a foreign flag vessel operating in the commerce of this nation have not involved interests of this nation, Congress has withheld its power to regulate. *Wildenhus' Case*, 120 U. S. 1 (1887).

This traditional respect accorded the vessels of friendly countries, however, has never implied acceptance of the exclusive authority of the flag nation. This is of particular importance for Panlibhon shipping, where the interests of the United States may be far superior to that of any other country. In most Panlibhon shipping the interests of at least two and often three nations are involved. The *Nassau* and *Victoria* are a perfect illustration of this. For here we have Liberian flag ships owned by Italian interests and manned by Italian crews operating exclusively in United States commerce.

The Board pointed out in *West India* that Panama, Liberia and Honduras have acquiesced in an arrangement whereby the United States has secured pledges from American owners of Panlibhon ships to make them available for

requisition by this country in time of national emergency (130 NLRB at 364-5). This "effective control" by the United States applies even to Panlibhon ships built in recent years that have never sailed under United States flag. If this country can reserve to itself the important right of requisition over much of Panlibhon shipping there obviously is nothing left to the claim of exclusive authority for the flag nation.

The thesis that the flag nation exclusively controls a vessel is simply another form of expression of the now thoroughly discredited fiction that a ship is a territorial extension of the nation whose flag it flies. This fiction originated in an earlier time when there was no Panlibhon shipping, and vessels on the high seas sailed under the flags of legitimate major maritime powers by whom they were in fact controlled. While the fiction may originally have had a limited serviceability, it no longer does, and both Incres and the Republic of Liberia recognize that it has been abandoned for "a theory of jurisdiction based on practical necessity."

If genuine "practical necessity" is to determine jurisdiction over Panlibhon shipping, then plainly Liberia can have no objection to sharing authority with the NLRB in the matter of regulating labor relations aboard the *Nassau* and *Victoria*. Never having plied in Liberian trade or even touched Liberian waters, employing non-Liberian crews, and controlled by non-Liberian owners, the vessels' labor relations, if they are to be regulated at all during the cruise season, must, as a matter of "practical necessity," be deemed to fall within the ambit of Board jurisdiction. Aside from mailing Liberia a registration fee for which the right to fly the Liberian flag is purchased, all vital connections of the vessels are with other countries, and the

most important connections from the standpoint of actual operations are with the United States.

The Internal Order Rule Does Not Bar Assertion of Board Jurisdiction.

Ineres and the Republic of Liberia argue that application of the Labor Act to the *Nassau* and *Victoria* would affect the internal order of the vessels, and under "long standing principles of international law," internal order is subject to exclusive regulation by the flag state. In *West India* the Board concluded, and we agree, that internal order "is but a part of the broader flag law doctrine . . . ." If flag law does not foreclose Board jurisdiction, then the internal order rule which is but a segment of flag law, could not have that effect. This finds support in *Lauritzen* where internal order was included in the discussion of flag law generally.

But even if internal order is considered apart from overall flag law no different result is reached. The classic formulation of the internal order rule is found in *Wildenhus' Case*, 120 U. S. 1, 12 (1887), where it was described as reaching "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country or the tranquility of the port . . . ." (italics added). In *Urivac v. Jarka Co.*, 282 U. S. 234, 240 (1934) it was indicated that internal order embraces "discipline and private matters that do not interest the territorial power."

From this we see, as the Board pointed out in *West India*, that the internal order doctrine is limited to those events which affect only the internal affairs of a vessel. This plainly renders the doctrine inapplicable to this case. Here we are dealing with two major ocean liners that have a substantial and continuing connection with the commerce

of this nation, and whose owners through their anti-union policies engendered considerable industrial strife and public turmoil which spilled over from the vessels onto the docks and port facilities of the City of New York.

Apart from these considerations, the Board correctly held in *West India* that application of the Act to seaborn commerce, does not involve any interference with the internal order of a vessel. To begin with, the internal order doctrine was "developed and acquired its meaning more than a hundred years ago—that is, at a time when the rights and obligations created by the Act were unknown at law" (130 NLRB at 357).

Moreover, as the Board has observed, assertion of jurisdiction will not in actual effect interfere in any way with the internal order and discipline aboard the vessels. Ingres would, of course, be obligated to bargain with IMWU under the Labor Act. But the Act does not require the inclusion of any specific terms in an agreement or the reaching of any specific agreement at all so long as there is bargaining in good faith. As this Court pointed out in *NLRB* v. *Insurance Agents International Union*, 361 U. S. 477, 488 (1960):

> "Congress (in enacting the Labor Act) intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

The Act in other words encourages private collective bargaining and any agreement reached would be the private agreement of the parties, and the internal order doctrine has no application to private action. The crewmembers of the *Nassau* and *Victoria* presently work under the terms of private individual agreements (Defs. Ex. C, R. 245). Certainly a private collective bargaining agreement would

not constitute interference with the internal order of the vessels—or at least not the type which the doctrine was classically or practically designed to prevent.

The lower court cases of *Evangelinos* v. *Andreavapor Cia Nav., S. A.*, 162 F. Supp. 520, 521-2 (S. D. N. Y. 1958); *Grievas* v. *Alianza Compania Armadora, S. A.*, 150 F. Supp. 708 (S. D. N. Y. 1957), *mod.*, 276 F. 2d 822 (1960); and *McQuade* v. *Compania de Vapores San Antonio, S. A.*, 131 F. Supp. 365 (S. D. N. Y. 1955), cited by the Republic of Liberia in its brief, do not hold as an absolute rule that the law of the flag, to the exclusion of all others, governs employment relations aboard a vessel. These cases involved suits by individual seamen against the owners of vessels on which they had been employed for earned wages or wage supplements and dealt with the problem of the choice of applicable law. The cases unquestionably recognize that the parties may by contract agree to substitute the law of another nation for the law of the flag; and if private persons may do this, then Congress certainly may do it, particularly for vessels engaged in the commerce of this nation.

Even more important is *Grievas* v. *Alianza Compania Armadora, S. A.*, *supra*, the Second Circuit expressed impatience with the concept that flag law governs all and observed that where a vessel has "meaningful" relations with a nation other than the flag nation, the courts would be justified in applying the law of that other nation (276 F. 2d at 825):

> "We do not here decide that occasions might not arise where some law having a more meaningful relation than the law of a 'nominal foreign registration' ought not to be chosen even when the choice is between two foreign laws rather than, as in the Jones Act cases, between a foreign law and our own."

Board Jurisdiction Will Not Interfere with Enforcement of Liberia's Laws.

The inferences are large in the briefs of Incres and the Republic of Liberia that assertion of Board jurisdiction will interfere with enforcement of Liberia's laws. Incres, significantly, made no attempt to plead or prove Liberian law at the trial. Nevertheless, the Republic of Liberia contends in its brief (at p. 7) that Liberia regulates and controls "all matters of employment . . . in relation to the internal management of Liberian vessels.". The old sections of Title 22 of the Liberian Code of Laws of 1956 cited in support of this contention (all of which were amended or repealed several years ago) flatly contradict it (Cumulative Supplement to Liberian Code of Laws of 1956, published by the Cornell Univ. Press (1960)). For these provisions are limited to events taking place in Liberia or on vessels in Liberian waters; and the design of the Code generally is to concern itself with seamen shipping from a Liberian port. Thus these sections deal with failure of a crewmember to report to a ship "in Liberia" (§312, now §203 of Title 19); absences from a vessel without leave "while in Liberia" (§313, now §204 of Title 19); harboring of deserters "in Liberia" (§314, now repealed); "determination of seaworthiness" of "any vessel in Liberia" (§315, now repealed); crew rosters for clearance of vessels ". . . in Liberia bound on a foreign voyage" (§316, now §205 of Title 19). Section 369 of Title 22, also cited by the Republic of Liberia; is non-existent.

Curiously, those sections of Title 22 of the Code which *are* applicable to foreign-owned Liberian flag ships are not cited by the Republic of Liberia. They deal with such things as registration fees and fines for violations of prescribed markings and letter sizes and clearly indicate that the main concern of Liberia's laws is with revenue from

foreign flag shipping (§§53, 54, 75). Free transfer from or to Liberian registry is permitted at any time and any place (§69).

Most significantly, Section 30 of Title 22 adopts "the non-statutory general Maritime Law of the United States" as the general maritime law of Liberia; and Section 33 provides that courts of other countries may exercise jurisdiction over actions arising under the code.

The Treaty of Friendship between the United States and the Republic of Liberia Does Not Bar Assertion of Board Jurisdiction.

Incres and the Republic of Liberia, careful to cite only a single paragraph, i.e., Article XV, of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, 54 Stat. 1739, T. S. No. 956 (1938), would have the Court read the treaty as embodying a form of "yellow-dog" compact immunizing Liberian flag shipping from the jurisdiction of the Board and the organizational activities of American maritime unions generally. However, the treaty, far from presenting obstacles to Board jurisdiction, actually authorizes it. Article XV sets forth the unchallenged truism that a vessel's flag determines its nationality. However, as we have shown (*supra*, pp. 42-45), and the Board held in *West India*, alien status is no obstacle to application of the Act.

The remainder of the treaty codifies a civilized program for co-existence of friendly nations "responsive to the spiritual, cultural, economic and commercial aspirations" of the nationals of each state. To this end, the treaty provides that nationals of one of the "contracting" countries, when in the territorial jurisdiction of the other shall enjoy specified rights and privileges. At best,

these rights and privileges are equal to those enjoyed by resident nationals. At least, they are equal to those enjoyed by the nationals of the most favored nation.

This means that Incres, granting it to be a full-fledged Liberian national, when engaged in the commerce of this nation, enjoys no higher prerogatives, no more exalted status than American ship operators. Incres is subject to the same obligations under the LMRA and the same free play of private economic forces in the American economy—including the organizing activities of American maritime unions. Federal District Judge Frederick van Pelt Bryan, in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 460, n. 1 (S. D. N. Y. 1959), cited with approval by this Court in *Marine Cooks* (362 U. S. at 365), recognized the inapplicability of the treaty:

> "At the outset it should be noted that the Treaty between the United States and the Republic of Liberia which is relied on by the Liberian plaintiffs does not confer upon them or upon their vessels any greater rights than those of American corporations or vessels. It goes no further than to place them on a parity with American corporations and vessels in the respects enumerated by the Treaty."

Article X of the Consular Convention between the United States and Liberia Does Not Bar Assertion of Board Jurisdiction.

The Republic of Liberia has appended Article X of the consular convention with the United States to its brief and argues in effect that the convention should be applied to oust the Board of jurisdiction over Liberian flag shipping. But the convention by its own terms permits no such result. To begin with, the convention provides:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order

> of private vessels of his country and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and persons charged with wrongdoing shall have entered a port within his consular district."

The reasons we discussed against acceptance generally of the internal order doctrine as precluding Board jurisdiction (*supra*, pp. 45-47) apply here against acceptance of the doctrine through the medium of the convention.

Significantly, however, the convention itself recognizes the difference between internal order and discipline, on the one hand, and disputes relating to wages and wage contracts, on the other. For the convention provides in plain language that the consular officer shall not have exclusive jurisdiction over wage matters and wage contracts but shall enjoy only concurrent jurisdiction with "local authorities." Thus the convention further provides:

> "Such (a consular) officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws."

Obviously, therefore, a vessel's internal order does not encompass wages or contracts relating thereto, and jurisdiction of "local authorities" over these matters, including undoubtedly the NLRB, is confirmed.

POINT IV.

Board jurisdiction will assure a uniform federal maritime labor policy for foreign flag shipping and other beneficial results.

Only through the processes of the Board can a uniform peaceful solution be achieved to the labor problems of flag of convenience shipping. If access to the Board is denied American maritime unions, they will be compelled to resort to self-help measures in the form of strikes and picketing to alleviate the crippling competition of such shipping.

The operators of convenience vessels will doubtless seek injunctions against such activities in state courts. Both Incres and the Republic of Liberia assert that New York courts have jurisdiction over this controversy. They ignore the federal courts because they have been told in *Marine Cooks* and *Afran* that the Norris-LaGuardia Act has taken the federal courts out of the injunction business in labor disputes. If Incres and the Republic of Liberia are correct about state court jurisdiction, then the courts of every coastal state in the nation will have unrestrained authority to shape their own individual solutions to the problem.

The result is bound to be a multiplicity of disparate and conflicting decisions that will place a premium on forum shopping. This will make a shambles of the firmly embedded principle of uniformity and consistency in administration of federal maritime law. *Southern Pacific Co.* v. *Jenson*, 244 U. S. 205, 215-17 (1917); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953). Incres acknowledges this problem in its brief and suggests that "if for any reason any undesirable diversity of local law should result, it is for Congress to determine what, if any, remedy should be pro-

vided as a matter of national policy." We submit that Congress has already determined as a matter of national policy to eliminate undesirable diversity by NLRB regulation.

In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court recently stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy."

These words are peculiarly apt here. For plainly, if there is to be peace on the waterfront and the full and unobstructed flow of commerce which is the objective of the Act, then the task of regulating and disciplining the organizational activities of maritime unions in the foreign flag field must be entrusted to the Board. Only by unitary federal control will it be possible to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" *Garner* v. *Teamsters Union*, 346 U. S. 485, 490 (1955).

The claim that state courts have jurisdiction of this controversy should be seen for what it is—an attempt to gain complete immunity for Panlibhon shipping from the organizing activities of American maritime unions. Ineres and the *amicus* countries obviously expect that state courts will equate a finding of lack of Board jurisdiction with illegality of union conduct, otherwise state court jurisdiction would not be so attractive to them.

Thus in the conclusion to its brief, the Republic of Liberia openly states that the NLRB lacks jurisdiction, and "there is therefore no impediment to a state court injunction." In short, by means of the state courts, Incres and the *amicus* countries intend to foreclose American maritime unions from any effort to alleviate the economic depredations of Panlibhon shipping. At least one state court has already decided that this Court's finding of lack of Board jurisdiction in the *Benz* case automatically condemns picketing of foreign flag vessels and justifies a state court injunction. *Fruit Dispatch Co.* v. *National Maritime Union*, 50 LRRM 2077 (La. Ct. of App., 1962).

Moreover, the claim that the New York state courts have jurisdiction of this controversy exposes a fatal inconsistency in the position of Incres and the *amicus* countries. On the one hand, they contend that the Board—a government agency—has no jurisdiction of the controversy. On the other hand, they contend that state courts—also agencies of government—have jurisdiction of the controversy. At the same time, the Republic of Liberia in the conclusion to its brief states that it has "sole jurisdiction over the subject matter." If the Republic of Liberia has sole jurisdiction, from whence arises the jurisdiction of state courts? And how justify that the state courts have jurisdiction and the NLRB does not? The very necessity for resort to the state courts emphasizes the intimate connection of Incres' operations with the economy of this nation. As the OEEC, *Study On The Expansion of The Flags of Convenience Fleets* (1958), pointed out (at p. 11):

> "The extent to which shipowners, charterers, etc. have recourse to the courts of the flag state of the defendant probably reflects to a greater degree than most aspects of shipping the true relationships between the ship and her flag. Where a shipping

company has no assets in the flag state, and the owners, directors and managers are not nationals, it is useless to have recourse to the courts in those countries as they cannot enforce their decisions. It is significant that even the owners of vessels under flags of convenience prefer to have their disputes settled in the courts of the maritime countries."

Yet a farther incongruity will result if Board jurisdiction is denied. On the one hand, we will have this Court saying in *Marine Cooks* that protest picketing of foreign flag ships by American maritime unions is protected against injunctions by the Norris-LaGuardia Act, and, on the other hand, that the processes of the Board are unavailable to help resolve the disputes peacefully.

This incongruity will in turn breed inequities. For while the maritime unions will be denied access to the Board for the purpose of being certified as bargaining representatives, nothing will prevent ship operators or others on their behalf from using the facilities of the Board to file charges against the maritime unions for secondary boycott activities or other violations of the Act, since any "person" may lodge a complaint against a union unfair practice. This is not mere speculation. In *Compania Maritima Samsac, Ltd.* CCH Lab. L. Rep., Par. 10081 (4th Ed. 1950), a maritime employer succeeded in persuading the Board that it did not have jurisdiction over an election petition filed by the union against his Liberian flag ship. However, when the union picketed, he procured a drydock owner to file charges against the picketing. *Moore Drydock Co.*, 92 NLRB 547 (1950). This incongruous result was pointed up by Mr. Justice Douglas in his dissent in the *Benz* case, 353 U. S. at 148.

Conclusion.

The judgment of the New York Court of Appeals should be affirmed.

Dated: August 22, 1962.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD., PETITIONER

v.

INTERNATIONAL MARITIME WORKERS UNION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 91

IVAN C. MCCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 107

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILLIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

In the *Incres* case, the oral opinion of the Special Term of the Supreme Court, New York County (R.

No. 33, pp. 250–256) has not been officially reported. The majority and dissenting opinions of the Appellate Division (R. 265–282) are reported at 11 A.D. 2d 177, 202 N.Y. Supp. 2d 692. The majority and dissenting opinions of the Court of Appeals of the State of New York (R. 285–295) are reported at 10 N.Y. 2d 218, 176 N.E. 2d 719.

In the *Empresa* case, in Nos. 91 and 93 the opinion of the District Court for the Southern District of New York (R. 46–52) is reported at 200 F. Supp. 484; and the opinion of the Court of Appeals for the Second Circuit (R. 59–82) is reported at 300 F. 2d 222. In No. 107, the opinion of the District Court for the District of Columbia (R. 51–67) is reported at 201 F. Supp. 82.

JURISDICTION

The judgment of the Court of Appeals of the State of New York in No. 33 was entered on July 7, 1961 (R. 296–297), and the petition for a writ of certiorari was granted on December 4, 1961 (R. 300; 368 U.S. 924).

The judgment of the Court of Appeals in Nos. 91 and 93 was entered on January 12, 1962 (R. 83), and the petitions for writs of certiorari were granted on June 11, 1962 (R. 88; 370 U.S. 915). The judgment of the District Court in No. 107 was entered on March 6, 1962 (R. 76–77), and the petition for a writ of certiorari, in advance of judgment by the court of appeals, was granted on June 11, 1962 (R. 82; 370 U.S. 915).

QUESTION PRESENTED

The United States will discuss the following question in this brief:

Whether the National Labor Relations Act applies to labor controversies on foreign flag ships engaged in the commerce of the United States—

(1) which are substantially engaged in the foreign commerce of, and have other bona fide substantial connections with, the flag nation, or

(2) which, although not engaged in the commerce of the flag nation, are beneficially owned, controlled and manned by foreign nationals and do not have any significant contacts with the United States other than the fact that they operate out of United States ports.

The United States will not discuss, and expresses no opinion on, the other questions raised by the parties.

INTEREST OF THE UNITED STATES

The *Empresa* cases (Nos. 91, 93 and 107) involve the general question, to what extent may the National Labor Relations Act be applied to vessels (1) in which United States citizens or business concerns have substantial control and/or beneficial interests, (2) which fly the flag of and are registered by a foreign nation and (3) which are engaged in the foreign commerce of the United States. Although the vessels in this large and loose category have widely different degrees of connection with the United States and foreign nations, there is one fundamental distinction which divides the general category into two classes.

(1) Some of these "U.S. owned" vessels are being used to a substantial extent to meet the shipping needs of the nation whose flag they fly; the vessels involved in the *Empresa* cases are good examples. Such vessels may also have other significant links with the flag nation. Thus, a vessel may be regularly fitted out and repaired in a port of the flag nation. Its nationals may compose a majority of her crew.

(2) Other "U.S. owned" vessels fly what is truly a "flag of convenience"—the colors of a nation with which they have little substantial connection.[1] Good examples are tankers flying the Panamanian flag which ply between the United States and Venezuela or the Middle East, and ore ships which fly the Liberian flag in commerce between the United States and Guiana. Most of these ships are registered under the laws of Panama and Liberia and fly the flags of those nations.

The *Empresa* cases (Nos 91, 93 and 107) fall into the first class. As described more fully in the Statement, *infra*, pp. 16–17, most of the vessels are owned and all are operated by Empresa, a Honduran subsidiary of the United Fruit Company. They are cargo vessels registered in Honduras; they fly the Honduran flag and have crews composed preponderantly of Hondurans employed in Honduras under shipping articles executed there. The crews are represented by an Honduran union, which has executed

[1] The term "flag of convenience" will be used in this brief to refer just to those vessels having no substantial connection with the country whose flag they fly.

an extensive collective bargaining agreement with Empresa. The ships operate between the United States and Central and South America, carrying cargoes of the United Fruit Company. They call regularly at United States ports and also at Honduran ports; they bring Honduran produce to the United States and carry American goods for use and sale in Honduras, although they also touch at other South and Central American ports. While the vessels are operated as part of the fleet of the United Fruit Company, to which they are chartered, their day-to-day operations are handled by Empresa, which provisions the ships, hires the officers and crews, disciplines personnel, and handles all matters concerning terms and conditions of employment. Empresa has no common officers or directors with United Fruit; and the corporation maintains its own records, owns land, and functions as a distinct corporate entity.

The *Incres* case (No. 33) involves a true "flag of convenience" because its two vessels are not carrying the commerce of Liberia and have no other significant connections with Liberia, whose flag they fly. See the Statement, *infra*, pp. 21–23. In our opinion, however, the American interests are not sufficient to bring the vessels within the general category with which we are concerned, *i.e.*, American owned and controlled ships, engaged in the commerce of the United States, but flying a foreign flag. The Incres vessels are owned and operated by a Liberian corporation, whose stockholders are Italian citizens and residents. The members of the crews are all foreign, principally Ital-

ian, and were signed on in Italy under Liberian articles. The vessels return to Italy every year, where they are repaired and refitted and the crews receive a vacation. The day-to-day management of the vessels is conducted partly by the president of the Liberian corporation, an Italian national; partly by a New York steamship agency which is a wholly owned subsidiary of the Liberian corporation; and partly by an agency in Nassau. Thus, while the two vessels are engaged for seven months of the year on regularly scheduled cruises between New York and Caribbean ports, no American control or ownership is involved.

In recent years American maritime unions have been seeking to organize foreign flag vessels which they feel have sufficient American contacts. In the course of the organizing campaigns the unions have invoked the jurisdiction of the National Labor Relations Board. The Board has regularly asserted jurisdiction regardless of whether the vessels fall in one class or the other.[2] The employers' challenges to

[2] In addition to the *United Fruit* case, the Board has taken jurisdiction in five other cases involving foreign flag ships. *West India Fruit and Steamship Co., Inc.*, 130 N.L.R.B. 343, an unfair labor practice case, pending on the company's petition to review, in the Fifth Circuit; *Peninsular and Occidental S.S. Co.*, 132 N.L.R.B. 10, also an unfair labor practice case, pending on the Board's petition for enforcement, in the Fifth Circuit; *Eastern Shipping Corp.*, 132 N.L.R.B. 930, *Hamilton Bro., Inc.*, 133 N.L.R.B. 868, and *Owens-Illinois Glass Company*, 136 N.L.R.B. No. 32, all representation cases. See also, *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625, certiorari denied, 366 U.S. 905. The Board has declined jurisdiction in *Dalzell Towing Company*, 137 N.L.R.B. No. 48.

the Board's jurisdiction bring the question of NLRB jurisdiction to the courts.

The United States has a profound interest in the resolution of these jurisdictional questions. It is concerned with the correct construction of a federal statute, although the primary responsibility for that question would, of course, normally rest with the National Labor Relations Board. The extraordinary feature of these cases which requires the participation of the United States, in order to express the considered position of the Executive Branch, is their potential impact upon foreign policy, national defense and maritime labor relations.

Foreign Policy. In the opinion of the responsible government officials, the assertion of NLRB jurisdiction over foreign flag vessels would embarrass the United States in the conduct of its international relations. Several foreign governments have already protested to the State Department the Board's assumption of jurisdiction. A number have filed briefs *amicus curiae* in this Court, in which they urge that application of the National Labor Relations Act to such ships would violate international law, would conflict with treaty provisions, and would have unsettling effects upon international relations. (See *infra*, pp. 47–49, where these protests and views are set forth in detail.) While the United States does not necessarily accept all of the contentions of these foreign nations and others interested, it is plain that widespread application of the National Labor Relations Act to foreign flag vessels would have significant

repercussions upon our foreign relations, and could lead to reprisals against American shipping by the flag countries involved.

The distinction between vessels which are substantially engaged in carrying the trade of the nations whose flags they fly and vessels which are not, has significance in terms of foreign policy. The claim of the flag nation to assert exclusive jurisdiction over the labor-management relationship is much stronger in the first class, and the basis for United States regulation is correspondingly weaker. Many maritime nations are not affected by the true "flag of convenience" problems raised by some Panamanian, Liberian and Honduran vessels. Furthermore, the Geneva Convention on the High Seas, although not yet effective, provides that a ship shall have the nationality of the State whose flag she is entitled to fly, and that there must be a "genuine link" between the State and the ship. See *infra*, pp. 45–46. In pointing to this possible distinction, however, we should not be understood to minimize the present and future diplomatic problems raised by any assertion of NLRB jurisdiction over any foreign flag vessel.

National Defense. The United States is also deeply concerned with the jurisdictional question because of its effect upon the national defense. Since the end of World War II the United States flag fleet has diminished from 2,500 active merchant vessels to 885. Merchant Marine Data Sheet, October 1, 1962, Press Release MANR 62–58. According to the records of the Department of Defense, as of September 30, 1962, there were 411 ships registered in Panama, Liberia or Hon-

duras which were under substantial American beneficial ownership and management. Although it would be inappropriate here even to outline defense plans and capacity, it should be clearly understood that the officials charged with responsibility for the national defense at the highest levels hold these vessels to be essential to national security if any of a number of forms of national emergency should develop.

"Under present ownership and registry the vessels are reasonably expected to be available in an emergency, and as such are included in emergency defense planning. Because of the greater individual size and more modern construction of these ships as compared with those under U.S. flag, they represent about 50 percent of our total active emergency shipping capability. Panama, Liberia and Honduras have implicitly and historically accepted this arrangement. One hundred and eighty-six of the vessels were sold with the approval of the Maritime Administration upon the bond-supported condition that they would be made available to the United States in an emergency upon its request and that they would not be resold or transferred to foreign owners or another registry without the consent of the Maritime Commission. See Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 501. The other 225 ships were constructed abroad: they are the newest, biggest and most useful vessels in the event of an emergency. Although the owners have in almost all cases given written commitments to make them available to the United States and Panama, Liberia and Honduras have indicated their willingness to have such trans-

fers made, the owners are under no obligation not to sell the vessels or transfer their registry, prior to a call for emergency use by the United States, if self-interest so requires.

There is a grave, although not precisely measurable, likelihood that the successful assertion of NLRB jurisdiction over foreign flag vessels would set in train a movement to sell them to foreign owners or transfer them to other foreign registries where they would not be available to the United States in case of emergency. The wage costs of foreign vessels are only one-quarter to one-third the costs of American vessels,[3] and the assertion of NLRB jurisdiction would be regarded as a step toward the establishment of the American scale. Although the owners so assert, no one else can say with assurance whether the vessels will in fact be sold or transferred upon the sustaining of NLRB jurisdiction, or that sustaining NLRB jurisdiction will result in organization by American unions and then in the establishment of American wage scales. But although the outcome is uncertain, it is clear beyond reasonable dispute that under present economic conditions the assertion of jurisdiction will tend to stimulate the transfer of the vessels to the maritime nations of Western Europe or result in their sale for scrap. And it is utterly baseless for counsel for AFL–CIO to assert

[3] See Hearings on Vessel Transfer, Trade-In, and Reserve Fleet Policies, Before the Subcommittee on the Merchant Marine of the House Committee on Merchant Marine and Fisheries, 85th Cong., 1st Sess., Part 1, p. 142; Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 500.

(see Brief for the AFL–CIO as *amicus curiae* in No. 93, pp. 16–24) that such transfers would not diminish the degree of effective U.S. control. Unlike Panama, Honduras and Liberia, other nations to whose registry the vessels might be transferred would not permit the United States control of the vessels in the event of all emergencies; and there are a number of contingencies, primarily involving non-NATO emergencies, in which it would not be adequate to have the vessels part of a NATO pool.

In sum, it is the considered judgment of the Secretary of Defense that the sustaining of NLRB jurisdiction over any foreign flag vessels would raise grave problems affecting national defense.

The distinction which we have drawn between the two classes of foreign flag vessels has no relevance to the national defense. On the contrary, the true "flag of convenience fleet" is, solely by coincidence, a good deal more important than the vessels which are serving the trade of the flag nation.

Maritime Labor Relations. The decline in the United States merchant marine has resulted in a serious loss of job opportunities on board merchant vessels—from 160,000 at the end of the war to less than 50,000 today. See Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 502; Merchant Marine Data Sheet, October 1, 1962, Press Release MANR 62–58. While many of these seamen are believed to have found employment in other industries, there is still a substantial number of unemployed maritime workers. The same condition is at the bottom of the declines in both ships and employment: maritime wage levels

are substantially lower in the rest of the world than in the United States and competition is in an international market. Congress has itself recognized this fact in the operating subsidy program under the Merchant Marine Act, 1936, 46 U.S.C. 1101, *et seq.*

The decline of job opportunities for American seamen is of serious concern to the United States for two reasons. First, it has resulted in substantial unemployment, with resulting waste of human resources and the injury to the economy. Second, it has led to considerable instability in maritime labor relations. The American maritime unions have undertaken a drive to organize the crews of foreign flag vessels operating under the beneficial ownership and control of domestic concerns. The unions apparently believe that if such ships can be organized and their wage scales brought up to the prevailing American standard, there will be more jobs for American seamen—either as vacancies occur on the flag-of-convenience ships or because the elimination of the wage differential will lead to the return of many of those ships to American registry (R. No. 33, pp. 216–218).

It is impossible to predict with accuracy how the assertion of NLRB jurisdiction would affect the stability of maritime labor relations. The unions' organizing campaign might or might not be successful; the pressure for American wage scales and the employers' resistance to such a drastic increase in costs of operation might conceivably produce even more unrest than the present situation. It is clear, however, that sustaining NLRB jurisdiction would bring

labor relations upon "flag of convenience" vessels within an established framework familiar to American employers and labor unions and administered by national authorities, whereas a denial of NLRB jurisdiction would take the problems outside of any established procedure and would leave them without a forum except as the State courts may be brought into a labor dispute, as in the *Incres* case, when a vessel is struck or picketed in a United States port.

The foregoing interests of the United States give the Executive Branch a vital concern for the Court's ruling upon the legal issues presented. Some of them, like the foreign repercussions, are factors with which Congress can be taken to have been concerned, and are therefore strictly relevant to the interpretation of the National Labor Relations Act. Others, like the importance of the "flag-of-convenience" fleet to the national defense, may not have been foreseen by Congress in enacting the National Labor Relations Act, but they explain a major interest of the United States in the ruling upon the legal issues.

The thorny nature of the problem as well as its grave implications make this a peculiarly suitable occasion for limiting the Court's decision to the exact question before it, without expressing any opinion upon the distinguishable issues that need not be decided until they require decision. With this traditional admonition in mind the United States submits—

1. Even if the flag and registry are not always decisive, the NLRB has no statutory jurisdiction

over unfair labor practices or questions of representation involving the crew of a vessel registered in or flying the flag of a foreign nation when the vessel is being used to meet the shipping needs of the country whose flag she flies and also has other *bona fide* connections with that country.

2. Even if the flag and registry of a vessel are not always decisive, the NLRB has no statutory jurisdiction over a vessel flying a flag of convenience where the beneficial ownership and crew are foreign and the vessel has other substantial contacts with the country of which her beneficial owners are nationals.

3. The Court should decide these cases without determining whether the NLRB may ever assert jurisdiction over a foreign flag vessel or, more particularly, whether the Act covers a vessel whose beneficial ownership and management are primarily vested in nationals of the United States and which plies regularly between a port of the United States and foreign ports without being used substantially to meet the shipping needs of the nation whose flag she flies.

The failure of the United States to take a position upon NLRB jurisdiction over "U.S. owned" flag-of-convenience vessels, or to urge grounds of decision broad enough to cover that question, neither retracts nor reaffirms the position it expressed in litigation before the National Labor Relations Board.

STATEMENT

A. *The Empresa Case—Nos. 91, 93 and 107.*

1. A petition was filed with the National Labor Relations Board ("NLRB") on November 13, 1959, by

the National Maritime Union of America, AFL-CIO, pursuant to Section 9(c) of the National Labor Relations Act, 29 U.S.C. 159(c), seeking certification as the representative of all unlicensed seamen employed aboard certain Honduran flag vessels operated by Empresa Hondurena de Vapores, S.A. ("Empresa"), an Honduran corporation (R. Nos. 91 and 93, pp. 9–10). The petition was filed against United Fruit Company, an American corporation which owns all of Empresa's stock (R. Nos. 91 and 93, p. 10).[1] Sociedad Nacional de Marineros de Honduras, a Honduran union which currently represents the employees aboard the vessels, was invited but declined to intervene in the proceedings (R. Nos. 91 and 93, p. 17). However, Sindicato Maritimo Nacional de Honduras ("Sindicato") another Honduran union, did intervene and participate (R. Nos. 91 and 93, p. 17). United Fruit Company, together with Empresa (which intervened in the proceedings), contested the NLRB's jurisdiction on the ground that the Act does not apply to the foreign flag vessels operated by Empresa (R. Nos. 91 and 93, p. 10).

2. This was one of several cases in which the NLRB considered the question of its jurisdiction over vessels flying the flags of other nations but operating to a greater or lesser degree in the foreign commerce of the United States. On February 16, 1961, the Board

[1] Of the thirteen vessels involved, ten are owned and operated by Empresa, and three are owned by Balboa Shipping Corporation but operated by Empresa as agent for Balboa. Balboa is a Panamanian corporation which, like Empresa, is a subsidiary of the United Fruit Company (R. Nos. 91 and 93, p. 60).

issued its decision in *West India Fruit and Steamship Company, Inc.*, 130 N.L.R.B. 343, the leading case. The Board held that, where a foreign flag vessel is engaged in the foreign commerce of the United States, and has substantial contacts with the United States, its operation comes within the coverage of the National Labor Relations Act; and that the NLRB has jurisdiction to remedy unfair labor practices committed on such a vessel.

3. On November 15, 1961, the NLRB denied the motion to dismiss the instant case for lack of jurisdiction and issued its Decision and Direction of Election (R. Nos. 91 and 93, pp. 9–19). The Board found that most of the vessels involved were owned and all were operated by Empresa, an Honduran corporation; that they were registered under the laws, and flew the flag, of Honduras; and that the crews were composed almost wholly of Honduran citizens, hired in that country under Honduran shipping articles. The Board further found that Empresa was wholly owned by United Fruit Company, an American corporation; that United Fruit elects Empresa's directors; that Empresa, with few exceptions, time charters all of its vessels to United Fruit, which in turn determines their voyages; that Empresa carries out the typical responsibilities of the owner of a vessel under a time charter, including responsibility for the physical conditions of the ships, provisioning them, hiring the officers and crew, and handling all matters with respect to employment, including payment of wages and discipline of the personnel; and that Em-

presa provides ships that are fully equipped and ready to put to sea. (R. Nos. 91 and 93, pp. 13–14.)

With respect to the relationship between United Fruit and its subsidiaries, the Board found that while long range planning is controlled by the parent company, the day-to-day operations are handled by the subsidiaries themselves. As to Empresa, it found that there were no interlocking directors with, or officers common to, Empresa and United Fruit, and that Empresa maintains all its own records, holds real estate in its own name, and functions as a distinct corporate entity (*id.*, p. 13).

Finally, the Board found that the vessels involved operate between Central and South American countries and the United States, carrying United Fruit cargo; that they call at Honduran ports and ports of this nation; and that Empresa vessels were used interchangeably by United Fruit with other vessels which it owned or controlled, the vessels being assigned on the basis of availability, size and speed (*id.*, p. 15).

The Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation * * *." The Board also held that "Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control

of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition." The Board ruled that the maritime operations involved "possess those substantial United States contacts which, under our decision in West India, bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present"; and that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding" (R. Nos. 91 and 93, pp. 15–17).

The Board ordered that an election be conducted among the employees of the Empresa vessels to determine whether they wished to be represented by the National Maritime Union, by Sindicato, or by no union (R. Nos. 91 and 93, pp. 18–19). Pursuant to the Board's direction, the Regional Director of the Second Region ordered that the election commence on December 17, 1961 (R. Nos. 91 and 93, p. 2).[5]

4. On December 12, 1961, Empresa, contending that the NLRB had no jurisdiction to direct the election, filed a suit in the District Court for the Southern District of New York to enjoin the Regional Director of the Board from conducting the election (R. Nos. 91

[5] On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port.[6] On vessels not scheduled to arrive during that period, the election was to be conducted by mail (R. Nos. 91 and 93, p. 2).

and 93, pp. 1–7). On December 16, 1961, the district court denied a temporary injunction on the ground that the mere holding of the election, pending final determination of the legal issues, would not result in irreparable damage to Empresa (R. Nos. 91 and 93, pp. 46–52).

The Court of Appeals for the Second Circuit unanimously reversed, ruling that a temporary injunction should issue (R. Nos. 91 and 93, p. 83). The court held that the district court had jurisdiction to entertain the action; and that, in light of the facts of the case, the Board had no jurisdiction under the National Labor Relations Act to direct the election (R. Nos. 91 and 93, pp. 59–82). In an opinion by Judge Friendly, the court stated that to apply the Labor Act "would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, * * * are still Honduras' 'primary concern'" (R. Nos. 91 and 93, p. 77). The court stated (R. Nos. 91 and 93, p. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as Lauritzen teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they

are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests.

5. While the suit by Empresa was pending in the district court, Sociedad, the Honduran union which presently represents the seamen on Empresa's vessels, filed a complaint against the members of the Board in the District Court for the District of Columbia seeking to enjoin the same election (R. 107, pp. 1–7). It asserted, among other things, that the "Board had no jurisdiction to direct an election among the members of the plaintiff organization" (R. No. 107, p. 4) and that the plaintiff's "members will be caused to violate Honduran law by participating in the election pursuant to the Board's order" (R. No. 107, p. 6). On December 16, 1961, the district court issued a temporary restraining order (R. No. 107, p. 47), and on January 22, 1962, after a hearing granted a preliminary injunction and denied the Board's motion to dismiss the complaint (R. No. 107, pp. 68–69). The court held that the National Labor Relations Act did not confer jurisdiction on the NLRB to conduct elections among foreign seamen manning vessels flying foreign flags, and hired under foreign contracts pursuant to foreign law (R. No. 107, pp. 51–67). The Board appealed from that decision to the Court of Appeals, and this Court granted a petition for certiorari before judgment in that court (R. No. 107, p. 82).

B. *The Incres Case—No. 33.*

This case involves a State court suit to enjoin picketing of foreign flag vessels in violation of State law.

1. The petitioner, Incres Steamship Company, Ltd. ("Incres"), owns two Liberian-registered cruise ships, the *Nassau* and the *Victoria*, which for seven months of the year ply between New York City and the Caribbean (R. No. 33, pp. 285–286). During February, 1960, the respondent, International Maritime Workers Union ("IMWU"), instituted a campaign to organize the seamen on the two vessels, and by the middle of April, 1960, the IMWU had pledge cards from a majority of the seamen (R. No. 33, pp. 201–206). After unsuccessful negotiations between Incres and the union, the latter began to picket the vessels on May 13, 1960 (R. No. 33, p. 286). On that date, the *Nassau* was picketed at her pier in New York, and about 100 members of her crew left the ship, causing the cancellation of the vessel's departure (R. No. 33, p. 286). On May 15, 1960, the *Victoria* arrived in New York but was unable to dock because the *Nassau* occupied her berth (R. No. 33, p. 286). As the *Victoria* lay at anchor, she was picketed by IMWU representatives in a launch (R. No. 33, p. 286). As found by the court below, the picketing and striking resulted in several of Incres' cruises being cancelled (R. No. 33, p. 286).

Immediately after the picketing of the *Nassau*, Incres instituted the present action in the Supreme Court of the State of New York, against the IMWU and certain of its officers. Incres alleged that the

activities of the IMWU constituted an unlawful interference with its business; that the IMWU could not be certified as collective bargaining agent by the NLRB or the New York State Labor Relations Board because neither the federal nor State statute applies to foreign ships with foreign crews; that the actions of the union unlawfully interfered with the internal management of foreign vessels; and that such activities were in violation of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia (R. No. 33, pp. 5–12). Ineres sought both an injunction and damages.

2. At the hearing in the New York Supreme Court, the following facts concerning the two vessels were adduced: Both the *Nassau* and the *Victoria* fly the flags of the Republic of Liberia and have been issued permanent certificates of registry by that country (R. No. 33, pp. 38–40, 234–241). Their officers are licensed by Liberia, the ships are inspected by Liberian agents, and they are subject to Liberian trade restrictions (R. No. 33, pp. 41–50).* The vessels are owned by Ineres, a Liberian corporation (R. No. 33, pp. 39–41), all of whose stock is owned by Italian nationals (R. No. 33, p. 51). All of the personnel aboard the vessels are foreign, principally Italian, and the members of the crew were signed on in Italy under Liberian articles (R. No. 33, pp. 13, 56, 60, 118, 245). The day-to-day management of the ships is conducted jointly by the President of Ineres, an Italian national who lives part-time in New York

*The only such restrictions concern trade with communist countries (R. No. 33, p. 42).

City; by a New York steamship agency, which is a wholly-owned subsidiary of Ineres; and by a steamship agency in Nassau (R. No. 33, pp. 52–62). While the regular cruises of the vessels are between New York and the Caribbean, the ships return to Italy every year, where they are repaired and refitted, and the crews receive vacations (R. No. 33, pp. 64, 67). Genoa, Italy, is the actual home port of the vessels (R. 269; see Petitioner's Brief, No. 33, p. 5, n.2).

3. The New York Supreme Court, pointing out that the vessels "were completely foreign owned, dominated and controlled; that the seamen on those ships were foreign nationals; that the officers of the Ineres Steamship Company, Ltd. were foreign nationals," held that it had jurisdiction to enjoin the picketing and that the picketing was unlawful, and granted a permanent injunction (R. No. 33, pp. 70–72, 250–256). The Appellate Division affirmed (R. No. 33, pp. 265–274). The Court of Appeals of New York, however, reversed, and ordered that Ineres' complaint be dismissed.

The majority of the New York Court of Appeals held (R. No. 33, p. 291) that, under the contacts theory upon which the Board had decided other flag-of-convenience cases (see *supra*, pp. 16; 6, n. 2), "[i]t is surely arguable that the board would exercise jurisdiction in the dispute as to which this injunction was ordered"; and that, under this Court's decision in *San Diego Unions* v. *Garmon*, 359 U.S. 236, the Board has exclusive primary jurisdiction over the dispute. Judge Fuld, dissenting (with whom Judge Burke and

except in one respect, Judge Voorhis, concurred), was of the view that the Act "clearly" does not apply "to a controversy affecting a foreign (Liberian) flagship—engaged in foreign commerce bringing it to and from United States ports for short stays—which is 100% owned and controlled by foreign nationals and manned by a foreign crew, recruited and hired in the ship's home port in Italy and serving under foreign articles entered abroad" (R. No. 33, p. 292).

SUMMARY OF ARGUMENT

The National Labor Relations Act gives the Board jurisdiction over questions of representation and unfair labor practices, and Section 2(6) defines commerce to include "trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia * * *." The question is whether Congress, by this generalized definition, intended the Act to apply to the foreign flag ships involved in these cases. While a literal reading of the Act might seem to cover these cases, no one contends that the Act should be given its broadest possible scope to cover all ships operating between the United States and any foreign country. The Act must be construed in accordance with settled principles governing the interpretation of legislation touching on foreign affairs.

The United States submits that, under these principles, the Act is not applicable to foreign flag ships operating in the foreign commerce of the United States, where (1) the vessel is used to carry the trade of the flag country and the latter has other substan-

tial contacts with it, or (2) although the vessel is not used in the trade of the flag country and the latter has no other significant contacts with it. the beneficial ownership and control of the vessel, as well as other of its significant contacts, are foreign rather than American. The United States takes no position on, and urges that the Court need not and should not decide in these cases, whether the Act is applicable to foreign flag vessels where the substantial beneficial ownership is American, the vessels are operated as part of an enterprise centered in the United States and the vessels are not substantially used to meet the shipping needs of the country whose flag they fly.

A. This Court has recognized, in cases involving the question whether the National Labor Relations Act preempts the field of labor relations to the exclusion of state regulation, that, because of the essentially integral character of such relations, only a single jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. The problems and potential clashes arising from dual regulation are even more serious where the two sovereignties involved are foreign nations, and the subject matter of the regulation is collective bargaining on a ship which plies between the countries. In a realistic sense, therefore, a decision sustaining the jurisdiction of an agency of the United States to regulate labor relations on these ships necessarily denies the jurisdiction of other nations.

B. 1. In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, this Court, in holding that the Labor

Act is not applicable to a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port, stated that "Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143); that the legislative history indicates that the Act covers "only the working men of our own country and its possessions" (p. 144); and that, in the absence of "the affirmative intention of the Congress clearly expressed," the Court would not "run interference in such a delicate field of international relations * * * where the possibilities of international discord are so evident and retaliative action so certain" (p. 147). While the *Benz* case is distinguishable because the vessel was only temporarily in an American port, its reasoning is equally applicable to the present cases, and compels the conclusion that the Act similarly does not cover the foreign flag ships here involved.

2. It is a well established principle of international law that the law of the flag State ordinarily governs the internal affairs of a ship, including the rights and duties of the crew toward the vessel and the relations between the officers and crew. In the absence of any strong basis which could call for the application of American law to labor relations on board these foreign flag ships—and there is none in these cases—the Act should be construed so as to reflect this settled principle giving "cardinal importance to the law of the flag" (*Lauritzen* v. *Larsen*, 345 U.S. 571, 584).

3. The application of the National Labor Relations Act to the foreign flag ships involved in these cases would have serious adverse consequences upon the international relations of the United States. There have been a number of diplomatic protests to the State Department over the Board's assertion of jurisdiction over flag-of-convenience shipping, and several nations have filed *amicus curiae* briefs in this Court in these cases urging that application of the Act to such ships would violate international law, would conflict with treaty provisions, and would have unsettling effects upon international relations. While the United States does not necessarily accept all of these contentions, it is plain that application of the Act to such vessels would have significant repercussions, and could lead to reprisals against American shipping by the flag countries involved. To give the Act an interpretation which would have such serious effects upon international relations "does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations" (*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384).

C. The interests of the United States in labor relations on board the Empresa and Incres vessels are insufficient, as compared with those of other nations, to bring them under the National Labor Relations Act.

1. Although the ships in the *Empresa* case are engaged in the foreign commerce of the United States, they are also substantially, if not equally, engaged in the foreign commerce of Honduras, whose flag they fly, and they have many other substantial connections with that country. In view of the real and substantial interests which Honduras has in regulating labor relations aboard these vessels, and the inevitable conflicts and clashes that would result if the United States also attempted to regulate such relations through application of the National Labor Relations Act, Congress cannot be deemed to have intended the Act to apply to these ships.

2. While the two ships in the *Incres* case are neither engaged in the commerce of, nor do they have any substantial operational contact with, Liberia (the flag country), the interests of the United States in labor-management relations on board the ships are much too insubstantial to justify the inference that Congress intended American labor policy to apply. The ultimate beneficial ownership of the ships is not American, but Italian, and virtually all of the ship's significant connections are foreign. The only contact the United States has with this maritime operation is that these Italian owned, controlled, staffed and operated Liberian flag vessels operate Caribbean passenger cruises out of a port of New York and partly under the direction of an Italian resident of New York. Weighed against the international implication of applying the Act to these ships, the minor extent to which their operations affect American

interests does not justify the inference that Congress intended, by the generalized language of the Act, to cover them. Since the Act does not apply, there was no occasion for the New York State Court of Appeals to step aside to permit the National Labor Relations Board to consider the applicability of the Act.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT IS NOT APPLICABLE TO FOREIGN FLAG VESSELS (1) WHICH ARE BEING USED TO MEET THE SHIPPING NEEDS OF THE FLAG COUNTRY AND WHICH HAVE OTHER BONA FIDE CONNECTIONS WITH THAT COUNTRY, OR (2) IN WHICH THE BENEFICIAL OWNERSHIP AND CREW ARE FOREIGN AND WHICH HAVE OTHER SUBSTANTIAL CONTACTS WITH THE COUNTRY OF WHICH HER BENEFICIAL OWNERS ARE NATIONALS

At the outset, we point out that there is no question that Congress has the constitutional power to apply the National Labor Relations Act to foreign flag ships, at least as long as they are within the territorial waters of the United States. *The Exchange*, 7 Cranch 116, 143; *Wildenhus's Case*, 120 U.S. 1, 11; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142. The question before the Court, therefore, is one of statutory interpretation—whether Congress intended the Act to apply to the ships involved in these cases.

Read literally, the Act might seem to apply. It gives the National Labor Relations Board jurisdiction over questions of representation and unfair labor practices affecting commerce (Sections 9(c)(1) and 10(a), 29 U.S.C. 159(c)(1) and 160(a)), and Section 2(6), 29 U.S.C. 152(6), defines commerce to include

"trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia * * *."

No one suggests, however, that this language should be given its broadest possible sweep, *i.e.*, that the Act covers *all* ships that operate between the United States and any foreign country. Indeed, the Board itself specifically disavows that the Act would apply to a labor dispute aboard the *Queen Mary* (see Brief for the Regional Director and Members of the National Labor Relations Board in Nos. 91, 93 and 107, hereinafter cited as "Bd. Br.," p. 35, n. 38), even though the operations of that vessel between the United States and Great Britain would be covered by a literal reading of the Act. For, as Judge Friendly explained in the *Empresa* case (R. Nos. 91 and 93, p. 72), "[w]ords are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage * * *."

The realities of ocean transportation are that ships which ply between two countries are engaged in the commerce of both countries, and that each country has a legitimate concern in regulating and controlling that commerce insofar as its own interests are involved. As Judge Friendly pointed out, with respect to the Empresa ships (*id.*, p. 77), "[t]hough the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras." The question is thus the extent to which Congress intended to make American labor policy applicable to American foreign commerce

in which both the United States and a foreign country have legitimate, although sometimes conflicting, interests.

The problem must be considered in the light of the practical consideration, set forth below, that only one nation can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. Accordingly, a decision sustaining the jurisdiction of an agency of the United States necessarily denies the jurisdiction of other nations. The question is, which nation is to have effective power to regulate labor-management relations on board a vessel engaged in international trade.

The basic error in the approach which the Board has taken in determining the applicability of the Labor Act to particular foreign flag ships lies in its failure to recognize, and give proper weight to, the conflicting and competing interests of the foreign nations involved. Because there is no single international regulatory authority which can adjust and accommodate these competing national interests, it is appropriate and necessary for American courts and agencies to construe American legislation whose effect might reach beyond our boundaries so as to minimize actual and potential conflicts with the regulatory policies and programs of foreign nations.

As we develop below, under settled principles governing the construction of legislation touching foreign affairs, the National Labor Relations Act is not applicable to foreign flag carriers operating in the foreign commerce of the United States, where—

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(1) the vessel is used to carry the trade of the flag country and the latter has other substantial contacts with it, or

(2) although the vessel is not used in the trade of the flag country and the latter has no other significant contacts with it, the beneficial ownership and control of the vessel, as well as other of its significant contacts, are foreign rather than American.

The United States takes no position on, and urges that the Court need not and should not decide in these cases, whether the Act is applicable to foreign flag vessels where the substantial beneficial ownership is American, the vessel are operated as part of an enterprise centered in the United States and the vessels are not substantially used to meet the shipping needs of the country whose flag they fly.

A. ONLY ONE NATION CAN EFFECTIVELY REGULATE THE PROBLEMS OF UNION ORGANIZATION AND COLLECTIVE BARGAINING WITH RESPECT TO A SINGLE VESSEL OPERATING IN INTERNATIONAL TRADE

This Court has recognized, in cases involving the question whether the National Labor Relations Act preempts the field of labor relations to the exclusion of State regulation, that, because of the essentially integral character of such relations, only one jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. In *Bethlehem Co.* v. *State Board,* 330 U.S. 767, 776, the Court pointed out: "If the two boards [Federal and State] attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily

denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." And in *La Crosse Tel. Corp.* v. *Wis. Board*, 336 U.S. 18, 25, it noted that dual regulation was "fraught with potential conflict." See also, *Hill* v. *Florida*, 325 U.S. 538; *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468; *Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62.

The problems and potential clashes arising from dual regulation of labor relations are even more serious where the two sovereignties involved are foreign nations, and the subject matter of the regulation is collective bargaining on a ship which plies between the countries. For in such a situation, each country may have a strong interest in regulating labor relations aboard a vessel which is engaged in its own foreign commerce; the two countries, however, may follow widely varying, or even diametrically opposed, labor-management relations policies. Inevitably then, an attempt by both nations to apply their own labor laws to the same ship is likely to lead not only to a clash of sovereignties, but also to the unsettling of the labor relationships which labor policy attempts to stabilize.

The serious problems posed by dual national regulation of labor relations on a ship operating in the foreign trade of both nations is dramatically illustrated in the *Empresa* case. The Republic of Hon-

duras has a labor code which apparently governs labor relations aboard ships of Honduran registry (R. No. 107, pp. 28–30, 43–44). Since 1941, the seamen on Empresa's ships have been represented by a Honduran Union, Sociedad Nacional de Marineros de Honduras ("Sociedad"), which is recognized by the Republic of Honduras as their collective bargaining agent (R. Nos. 91 and 93, pp. 4, 60). This union has entered into a detailed collective bargaining agreement with Empresa, effective through February 15, 1963, which covers such subjects as hiring, wages, hours, vacations and holidays, overtime pay, grievance procedures and arbitration, medical treatment, and strikes (id., pp. 22–35, 60).

Both Honduran law and the collective bargaining agreement require Empresa to recognize Sociedad as the exclusive bargaining agent of its unlicensed seamen (*id.*, pp. 23, 60). Sociedad, however, declined to appear on the ballot in the election which the Board has directed to be held on Empresa's vessels (*id.*, pp. 18–19). On the other hand, the National Maritime Union of America, AFL–CIO ("NMU"), which is one of the unions on the ballot in that election, cannot represent Empresa's seamen under Honduran law, since the Honduran Labor Code forbids a union from representing Honduran seamen aboard Honduran-registered ships if "it does not have recognition of its juridic personalty" (which the NMU apparently does not have in Honduras), or if at least 90 per cent of its members are not Honduran (*id.*, pp. 5, 61). Thus, if the NMU were selected by the Honduran seamen aboard Empresa's vessels as their rep-

resentatives, any bargaining between Empresa and that union would run afoul of the provisions of Honduran law making Sociedad the exclusive bargaining agent of these same seamen.

Empresa would thus be placed in the dilemma that, if the NMU were selected as the employees' representative and it bargained with the NMU as required by the National Labor Relations Act, it would violate Honduran law and its obligations under its collective bargaining agreement with Sociedad; conversely, if it refused to bargain because of its obligations under Honduran law, it would presumably be in violation of the National Labor Relations Act.[1] In addition, it

[1] The conflicting obligations which Empresa might have under American and Honduran law if the Labor Act were applied to its ships presents problems similar to those which have arisen when an antitrust judgment has attempted to compel a defendant in an American court to take steps abroad which conflict with the laws of a foreign country. In such a situation the foreign court may decline to give effect to the American judgment. Compare *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 105 F. Supp. 215 (S.D. N.Y.), where the district court directed the reconveyance of certain patents which DuPont had conveyed to Imperial Chemical Industries, a British Company, with *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries*, L. R. [1953] 1 Ch. 19, L. R. [1955] 1 Ch. 37, where the British court enjoined the British Company from reconveying the patents as directed by the American judgment. In such circumstances, the decree of the American antitrust court may recognize, either explicitly or by interpretation, that it does not require the defendant to do anything which would violate the law of a foreign country. See *United States* v. *General Electric Co.*, 82 F. Supp. 753, 115 F. Supp. 835, 878 (D. N.J.); *Holophane Company* v. *United States*, 352 U.S. 903, affirming (except as to one paragraph of the judgment, which was affirmed by an equally divided court) 119 F. Supp. 114 (S.D. Ohio).

seems probable that when the Empresa vessels were in Honduran waters, the Honduran courts and authorities would decline to give effect to any contract between Empresa and the NMU and, conversely, would require Empresa to observe its present agreement with Sociedad. Thus, different rules might govern the internal operations of the ship, depending upon whether she happened to be in an American or a Honduran port; and there would be continuing uncertainty and conflict over which rules apply when the ship was on the high seas or in ports of other nations. This Court's language in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384, in refusing to apply the law of the place of injury to a maritime tort involving a foreign sailor on a foreign ship, is, with the substitution of the words "labor relations" for the word "compensation," fully applicable to the present cases:

> To impose on ships the duty of shifting from one standard of [labor relations] to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. * * *

The potential conflicts and problems that would arise if the United States and Honduras both attempted to regulate labor relations aboard the Honduran ships involved in the *Empresa* case illustrate the need for construing the Labor Act so as to avoid such difficulties. The only alternative, under the NLRB view, is equally drastic: it is to say that

Congress denied Honduras the right to govern labor-management relations between an Honduran corporation as employer and Honduran crew upon an Honduran vessel substantially engaged in the foreign commerce of Honduras.

An intent to assert such an aggressive position should not lightly be attributed to Congress. As we now show, when the Act is viewed in the light of its purposes, history and policy and the settled rules which have been developed for construing legislation having an impact upon international relations, it must be read as not applying to foreign flag vessels which either operate substantially in the commerce of, and have other substantial contacts with, the foreign flag country, or of which the beneficial ownership and crew, and other significant contacts, are foreign.

B. CONGRESS DID NOT INTEND THE NATIONAL LABOR RELATIONS ACT TO APPLY TO FOREIGN FLAG SHIPS WHICH CONSTITUTE AN INTEGRAL PART OF THE FOREIGN COMMERCE OF, AND HAVE OTHER BONA FIDE CONTACTS WITH, THE FLAG COUNTRY, OR IN WHICH THE BENEFICIAL OWNERSHIP AND CREW AND OTHER SIGNIFICANT CONTACTS ARE FOREIGN

1. *The Act should be construed to recognize the need for comity and reciprocity in relation to international maritime commerce, and for avoiding conflict with international usage.*

In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, this Court held that the Labor Act is not applicable to "a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port" (p. 139). While

the case is, of course, distinguishable in that the vessel was only temporarily in an American port, and did not operate regularly in the foreign commerce of the United States, the considerations relied upon by the Court are, we believe, equally applicable in the present cases, and require the conclusion that the Act is not applicable to the *Empresa* and *Incres* vessels.

The Court stated in *Benz* that "[o]ur study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143). It pointed out (pp. 143–144) that the "whole background of the Act is concerned with industrial strife between American employers and employees"; that the report of the House Committee had stated that the bill "has been formulated as a bill of rights both for *American* workingmen and for their employers" and was designed to correct inadequacies in legislation which had deprived "the *American* workingman * * * of his dignity as an individual" (emphasis by the Court); and that this statement "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." The Court noted (pp. 144–146) that, in the Seamen's Act of 1915, Congress had prohibited the payment of seamen's wages in advance and specifically made the prohibition applicable to foreign vessels "while in waters of the United States"; and that the Court had refused to read into that Act, in the absence of a specific Congressional intention, a "sweeping provision" making the Act applicable to prohibit

advances of seamen's wages "made by foreign vessels in foreign ports." The Court stated (p. 146) that similarly "such a 'sweeping provision' as to foreign applicability was not specified in the [National Labor Relations] Act," and it concluded (pp. 146–147):

> * * * We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. *For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.* We, therefore, conclude that any such appeal should be directed to the Congress rather than to the courts. [Emphasis added.]

The rule invoked in *Benz* is a well-established principle governing the interpretation of statutes which might be extended to foreign vessels. Earlier, in *Lauritzen* v. *Larsen*, 345 U.S. 571, 582, the Court said—

> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. * * * in dealing with international com-

> merce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Here, as in *Benz, supra,* "the possibilities of international discord are so evident and retaliative action so certain" if the Labor Act is held applicable to the foreign flag ships involved in these cases, that a strong showing of an intention to assert jurisdiction would be required to support the NLRB ruling. Here, as in *Benz,* 353 U.S. 138, the "parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act" (p. 142). The argument for jurisdiction, as in *Benz,* is an effort to apply the Act "to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143).[8] In the absence of "the affirmative intention of Congress clearly expressed" (p. 147) that the Act apply to labor disputes aboard such ships, the rationale of *Benz* requires the conclusion that here, too, Congress did not intend the Board "to run interference in such a delicate field of international relations" (*ibid.*).[8]

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[8] The Board points out (Bd. Br., 43) that in 1959 Congress enacted Section 14(c)(1) of the Act, which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959"; and it states that, under

2. *Comity and reciprocity in relation to international maritime commerce require honoring, in the absence of any strong basis for asserting jurisdiction, the traditional maritime principle that the law of the flag nation governs the internal affairs of a vessel.*

It has long been recognized that comity, reciprocity and stability in international maritime relations are promoted by observing Chief Justice Marshall's wise admonition that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *The Charming Betsy*, 2 Cranch 64, 118. See also *The Nereide*, 9 Cranch 388, 423; *MacLeod* v. *United States*, 229 U.S. 416, 434; *Sandberg* v. *McDonald*, 248 U.S. 185, 195; *Lauritzen* v. *Larsen*, *supra*, 578.

The two relevant principles of international law are well-established. *First*, the nationality of a ship is

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those standards, the Board would have asserted jurisdiction over these disputes, and had, in fact, already taken jurisdiction in one flag-of-convenience case. The same contention is made by the petitioner in No. 93 (Br. 35–37, 54), and by the Seafarer's International Union in its brief *amicus curiae* in No. 33, pp. 14–16.

The short answer is that the "standards prevailing upon August 1, 1959" to which Section 14(c)(1) refers were the minimum dollar amounts of commerce which the Board had announced it would require before taking jurisdiction. See *Twenty-Third Annual Report*, National Labor Relations Board (G.P.O., 1959), p. 8; *Siemons Mailing Service*, 122 N.L.R.B. 81, 85; II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (G.P.O., 1959) 1153–1154, 1720; 105 Cong. Rec. 6548–6549, 18134. There is nothing in either the language or the legislative history of the 1959 Act which gives even faint support to the Board's suggestion that Section 14(c)(1) establishes the applicability of the Labor Act to the foreign flag ships involved in these cases.

determined by its registration and flag. *Lauritzen* v. *Larsen*, 345 U.S. 571, 584. See also, *e.g.*, *The Merritt* 17 Wall. 582, 585–586; *In Re Ross*, 140 U.S. 453, 472–473; *St. Clair* v. *United States*, 154 U.S. 134, 151–152; *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 123; *United States* v. *Flores*, 289 U.S. 137, 155–157. *Second*, the law of the flag state ordinarily governs the internal affairs of a ship, including the rights and duties of the crew toward the vessel and the relations between the officers and crew. Thus, in *Wildenhus's Case*, 120 U.S. 1, 12, the Court, after pointing out that a nation has the power to subject foreign ships to its domestic law when they enter a domestic port, continued:

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. * * *

In *The Belgenland*, 114 U.S. 355, 367, the Court stated that questions relating to seamen's wages are normally governed by the law of the flag country.

The foregoing principles of international law are reflected not only in the settled decisions of this Court,* but also in the Treaties of the United States and the regulations of the State Department. The United States has Treaties of Friendship with many foreign nations, including Honduras and Liberia, dealing with the vessels of the respective countries. For example, Article X of the Treaty of Friendship, Commerce, and Consular Rights between Honduras and the United States, 45 Stat. 2618, provides that merchant vessels flying the flags and having the papers of either country "* * * shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." Article XXII of the same treaty provides:

> A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

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* The principle that the flag and registry of a vessel determine the law applicable to internal matters has sometimes been viewed as based on the theory that a ship is part of the territory of the nation whose flag she flies. *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176; *United States* v. *Flores*, 289 U.S.

Similar provisions are contained in Article XV of the Treaty of Friendship, Commerce, and Navigation (54 Stat. 1739), and Article X of the Convention Respecting Consular Officers, between Liberia and the United States (54 Stat. 1751).

The regulations of the State Department similarly provide that a foreign vessel includes "* * * any vessel regardless of ownership, which is documented under the laws of a foreign country," 22 C.F.R. 81.1(f); and that persons employed on foreign vessels are "* * * subject to the jurisdiction of the country under whose registry the vessel operates * * *." 22 C.F.R. 81.12.

When Congress enacted the National Labor Relations Act, it presumably defined the reach of the Act, in its application to foreign flag vessels, in the light of these settled doctrines of international law. "Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions * * * it would be applied by the courts to foreign events, foreign ships and

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137, 155. On the other hand, this theory of territorial extension has been described as "a figure of speech, a metaphor." *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123. But whatever the theory upon which the rule rests, the rule itself is both firmly established and of practical necessity. As this Court pointed out in *Lauritzen* v. *Larsen*, *supra*, 345 U.S. at 585:

> Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

foreign seamen only in accordance with the usual doctrine and practices of maritime law" (*Lauritzen v. Larsen*, 345 U.S. 571, 581).

This is not to say that Congress necessarily intended the Act never to be applicable to foreign flag vessels. For the principle is only that maritime law "gives cardinal importance to the law of the flag," and that "the weight given to the ensign overbears most other connecting events in determining applicable law" (*Lauritzen v. Larsen*, 345 U.S. 571, 584, 585). There may be situations in which other considerations may outweigh the law of the flag, and may call for the application of the Labor Act to foreign flag vessels.

We lay aside, therefore, the question of how much deference is due the labor laws of the flag nation where a foreign flag vessel is not used to meet the shipping needs of the country of its registry, and has no significant connections with that country other than the fact of registry. One would have to consider not only the weight of this country's interests but also the possible significance, if any, of the fact that the doctrine that the law of the flag should control was established long prior to the growth of true "flag of convenience" shipping, lacking any significant link with the flag nation and having close links to the United States.[10] It is also relevant to note in this connection that Article 5 of the 1958 Geneva Convention on the High Seas (2 U.N. Conf. on the Law of the Sea, Geneva (1958) 136), which has been ratified by the

[10] See, Harolds, *Foreign Flag Operations*, 28 Fordham L. Rev. 295; Note, *Panlibhon Registration*, 60 Col. L. Rev. 711; Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498.

United States but is not yet effective because the requisite number of countries have not yet ratified, provides:

> 1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
>
> 2. Each State shall issue to ships which it has granted the right to fly its flag documents to that effect. [Emphasis supplied.]

Thus, the Convention suggests the possibility that the "law of the flag" principle may be qualified by the requirement that there be a "genuine link" between the flag State and the vessel, although we should also point out that the Senate Report on the Law of the Sea Conventions, Executive Rept. No. 5, 86th Cong., 2d Sess., p. 5, reflects the view that the "genuine link" principle does not mean that one State may determine unilaterally that there is no genuine link between a ship and the country of its registry. See also, Note, *Effect of the "Genuine Link" Principle of the 1958 Geneva Convention on the National Character of a Ship*, 35 N.Y.U. Law Rev. 1049; Jessup, *The United Nations Conference on the Law of the Sea*, 59 Col. L. Rev. 234, 255–257; Boczek, *Flags of Convenience* (Harvard University Press, 1962), pp. 209–286, 290–292.

There is no room for doubt or qualification in the cases before the Court. In the *Empresa* cases, the vessels play an integral part in the trade of, and also have significant contacts with, the flag country. In the *Incres* case the beneficial owners, crew and significant contacts are all foreign rather than American. Plainly, there is not present any "heavy counterweight" to the fact of foreign registry (*Lauritzen* v. *Larsen*, 345 U.S. 571, 586) which could possibly call for the application of American labor law to labor relations on board these foreign flag ships. The case for respecting the law of the flag is much stronger in dealing with labor relations than in dealing with torts, the payment of wages and similar incidents which might be governed by various sets of laws on different occasions without great inconvenience to the parties concerned. Collective bargaining, however, is an on-going relationship which must be governed, regardless of the temporary location of the vessel, by a single set of rules. See, *supra*, pp. 32–37.

3. *The assertion of NLRB jurisdiction over these vessels, in disregard of the established principle of international law, would disturb international relations with friendly maritime nations.*

The dangers to which we have adverted are neither abstract nor theoretical. The position of the Board has already evoked protests and mention of reprisal among maritime nations.

Shortly after the Board announced its decision taking jurisdiction in the *Empresa* case the Ambassador of Honduras filed a formal diplomatic protest with

the Secretary of State stating that his government felt great concern—

> because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduras registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and United States * * *. [R. No. 107, p. 42.]

The Ambassador invoked the "well established principle of International Law" that "a vessel is subject exclusively to the law of the State of registry and whose flag * flies regardless of ownership," and argued that "a domestic statute should never be construed to violate binding and effective principles of International Law" (R. No. 107, p. 44). He further stated (*ibid.*) that under the Honduran Labor Law "Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag," that this "jurisdiction can not be renounced," and that "the Honduras Government can never accept that a foreign Union * * * represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor Laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws."

The Republic of Liberia has taken a similar position in a brief *amicus curiae* in this Court challenging NLRB jurisdiction over the vessels involved in the *Incres* case. On several occasions Liberia has made it clear that it would regard an assertion of NLRB

jurisdiction over vessels flying the Liberian flag as a serious violation of the principles of international law (Brief of the Republic of Liberia in No. 33, p. 5). The Republic of Panama considers any attempt by the United States to apply its labor laws to Panamanian flag vessels as "constituting a direct offense to the sovereign rights of Panama to govern all such matters concerning the internal affairs of its vessels" (Brief of the Republic of Panama as *Amicus Curiae* in No. 33, p. 7). Panamanian representatives have also spoken of the likelihood of reprisals against the United States in the event it persists in the alleged "offense" (*id.*, p. 19)

The government of the United Kingdom of Great Britain and Northern Ireland has also protested the action of the NLRB, contending that the assertion of jurisdiction over foreign-flag vessels threatens a profound disturbance of maritime law with resulting unsettlement of a significant aspect of international relations. See the Briefs of the Government of the United Kingdom of Great Britain and Northern Ireland as *amicus curiae*, in No. 33 and in Nos. 91 and 93.

Although the United States does not necessarily accept all the contentions of the foreign nations concerning foreign flag vessels, it should be stressed that the views expressed by them in this Court are not merely the arguments of counsel, but have been firmly conveyed to this government in diplomatic intercourse. In the opinion of the United States officials responsible for our international relations, insistence upon application of the National Labor Relations Act to these

foreign-registered ships would be considered to be an affront to foreign nations and would have disturbing consequences.

The international consequences of asserting jurisdiction over maritime labor relations involving U.S. business interests cannot be supposed to have been the sole factor in formulating a congressional policy, nor do we suggest that they are the only proper criterion in construing the Act. In the present case, however, as we now show, the domestic interests of the United States are not sufficiently affected to justify a departture from the generally-accepted international rule.

C. THE INTERESTS OF THE UNITED STATES IN LABOR RELATIONS ON BOARD THE EMPRESA AND INCRES VESSELS ARE INSUFFICIENT, AS COMPARED WITH THOSE OF OTHER NATIONS, TO BRING THEM UNDER THE NATIONAL LABOR RELATIONS ACT.

1. Although the ships in the *Empresa* case are engaged in the foreign commerce of the United States, they are also substantially if not equally engaged in the foreign commerce of Honduras (R. Nos. 91, 93, p. 77). They call regularly at Honduran ports (*id.*, p. 60); they play an important, if not a vital, role in the foreign trade of Honduras.

The vessels also have substantial other contacts with Honduras. See the Statement, *supra*, pp. 16–17. As Judge Friendly explained (*id.*, p. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran

corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters.

Since the vessels are engaged in the commerce of Honduras and have many other substantial connections with that country, Honduras, whose flag they fly, has a substantial interest in regulating labor relations aboard the ships. In these circumstances, for the reasons previously discussed, Congress cannot be deemed to have intended the National Labor Relations Act to apply to the ships.

The basic error of the Board in the *Empresa* case was its view that it need inquire only into the existence of "substantial United States contacts" which would bring the Empresa ships "within the jurisdictional coverage of the Act" (R. Nos. 91, 93, p. 16). In determining whether, and to what extent, the Act may properly be applied to labor relations aboard foreign flag vessels, the crucial threshold question is not merely the extent of the United States contacts but, more important, whether the vessels have sufficiently substantial connections with the flag country so that Congress cannot fairly be said to have intended to overturn the established doctrine of international law and displace the foreign regulatory pattern by the American standards.

In the present case the interests of Honduras in this labor-management relationship are not only real and substantial but, if the factor were material, would seem to overbalance the interests of the United

States. Thus, while the vessels are engaged in the foreign commerce of the United States, it is also the foreign commerce of Honduras; the situation is no different in this respect than a claim to jurisdiction over the seamen on board the *Queen Mary*. The owner and immediate employer is an Honduran corporation; and although a United States corporation owns all the stock, it is undeniable that the Honduran corporation has an independent existence with its own officers, employees and business. The vessels are operated as part of the United Fruit enterprise but under time charters, which are familiar maritime engagements, placing upon the Honduran owner the responsibility not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews and handling all matters concerning terms and conditions of employment, including payment of wages and discipline. The crews are mostly Hondurans; they are hired in Honduras, return to Honduras and sign Honduran shipping articles. They have been represented for the purposes of collective bargaining by an Honduran union.

Under these circumstances there is no room for either administrative or judicial weighing of "contacts." Any assertion of jurisdiction to apply the National Labor Relations Act for the purpose of determining the bargaining agent under the laws of the United States would frustrate the laws of Honduras. The Act's all-encompassing definition of "commerce" is not enough to support the conclusion that Congress intended to authorize an administrative agency thus

to sweep aside the traditional right of another sovereign state whose interests in labor-management relations on board the vessels flying its flag are not nominal, but real and substantial.

The Board attempts to justify its practice of determining the applicability of the Act to foreign-flag ships on the basis of evaluating the relative significance of the American and foreign contacts, by reference to *Lauritzen* v. *Larsen*, 345 U.S. 571 (see *West India Fruit and Steamship Co.*, 130 N.L.R.B. 343, 354–356). The *Lauritzen* case was a personal injury action brought under the Jones Act by a Danish seaman for injuries sustained aboard a Danish ship while in Havana. The Court, in denying recovery, set forth "the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them" (p. 583). See also, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 381–384.

But the choice of law to govern a maritime tort raises altogether different questions than a claim of jurisdiction to regulate labor-management relations. Although the weighing of various "contacts" is a recognized basis for choosing the law to govern the legal incidents of a single transaction, this Court in *Romero* recognized the undesirability of applying shifting standards for determining compensation for injuries as a vessel moves from the territorial waters of one nation to another (358 U.S. at 384, *supra*, p. 36). It would be even more undesirable to apply such shifting standards for deciding whether the Na-

tional Labor Relations Act applies to foreign flag vessels, for the collective bargaining relationship has a continuing and integral character that debars constructive regulation by more than one jurisdiction (see *supra*, pp. 32–37). Thus, even if the Act applies to foreign flag ships which use foreign registration, despite being completely American in ownership and operation, to escape American labor laws, Congress cannot be supposed to have intended the application of the Act to other foreign flag ships to depend upon an *ad hoc* evaluation of the relative significance of their domestic and foreign contacts.

2. In the *Incres* case, the New York Court of Appeals, in reversing the State court injunction against picketing of the foreign flag vessels, held that, under the contact theory which the Board employs for determining the applicability of the Act to such ships, it "is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered" (R. No. 33, p. 291); and accordingly that, under *San Diego Unions* v. *Garmon*, 359 U.S. 236, 245, the subject matter of the litigation was within the exclusive primary jurisdiction of the Board.

The two ships in the *Incres* case fly what we have called "true flags of convenience," *i.e.*, they are neither engaged in the commerce of, nor do they have any substantial operational contact with, Liberia, the country whose flag they fly. But the interests of the United States in labor-management relations on board these ships are much too insubstantial to justify the inference that Congress intended American labor

policy to apply. The ultimate beneficial ownership is not American but Italian.

Virtually all the significant connections of these vessels are foreign. The vessels are of Liberian registry, fly the Liberian flag, and are owned by a Liberian corporation, all of whose stockholders and officers are Italians (R. No. 33, pp. 13, 47, 50). All of the seamen are foreign citizens and residents, principally Italian; they were employed in Italy under Liberian articles (*id.*, pp. 13, 56, 60, 292). These vessels return to Italy yearly to give the crews leave and for refitting and repair (*id.*, pp. 64, 67, 266, 292). Their home port is Genoa (R. 269; see petitioner's brief, No. 33, p. 5, n. 2). The day-to-day management of the vessels is conducted by an Italian national, located in New York City, who is president of the Liberian corporation which owns the vessels, by a New York corporate steamship agency which is a wholly-owned subsidiary of the Liberian corporation, and by a tourist agency in Nassau, Bahamas (R. No. 33, pp. 51–62). The only contact the United States has with this maritime operation is that these Italian owned, controlled, staffed and operated Liberian flag vessels operate Caribbean passenger cruises out of the Port of New York and partly under the direction of an Italian resident in New York.

Weighted against the international implications of applying the Act to these ships (see *supra*, pp. 37–40, 47–50), the minor extent to which their operations affect American interests does not justify the inference that Congress intended, by the generalized language of the Act, to cover them. As Judge Fuld cogently

pointed out in his dissenting operation in the Court of Appeals (R. No. 33, pp. 292–293):

> * * * [I]f the National Labor Relations Act were to be held to cover the foreign-owned ships here involved simply because they dock in New York City and employ a New York corporation as their American agent, it would follow that the Act applies to give the board jurisdiction over controversies involving seamen on board the great fleets of foreign flag and foreign-owned passenger and cargo vessels while engaged in trips between the Port of New York and the foreign countries.
>
> It is hardly necessary to observe that in terms of comity between nations such a result could not help but have a disastrous effect. * * * We will not impute to Congress—unless the intention is clearly expressed (cf. *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285–286)—a concern to deal with the labor relations of alien seamen on foreign flag vessels, owned by foreign nationals throughout the world or even while they are in American waters. * * *

As we have shown above, it has long been a settled rule of international law that the flag should ordinarily control the internal affairs of a ship (see, *supra*, pp. 41–44). If an intent to authorize any exceptions is to be imputed to Congress—a point as to which we express no opinion—surely the authority must be confined to cases in which the foreign flag is used by United States enterprises to avoid their obligations under United States law. The *Incres* case affords no basis for such a contention.

It follows that the National Labor Relations Act does not "arguably" apply to the labor dispute involving the *Incres* ships so as to require the New York courts to disclaim jurisdiction. This is true for two reason.

First, upon the undisputed facts the Board could not, without violating the statute, conclude that it has jurisdiction. There is no room for further investigation, no occasion for drawing inferences or weighing and balancing opposing considerations, no opportunity for exercising an expert judgment of policy that might rationally lead to an assertion of NLRB jurisdiction. Labor-management relations upon a foreign flag vessel whose ownership, both corporate and beneficial, whose management, and whose employees are all foreign, is not even "arguably" covered by the National Labor Relations Act. There is no room, therefore, for the application of the doctrine stated in the second *Garmon* case (359 U.S. 236, 245) and *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

Second, if it were necessary to reach the point, we would agree with Judge Fuld that the doctrine of the second *Garmon* case does not apply to so unique an issue as the extraterritorial applicability of the National Labor Relations Act. Judge Fuld stated (R. No. 33, pp. 294-295):

> This is clearly not a *Garmon* * * * type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity, under the Act.

> If there is 'arguability" here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. In other words, as we have already stated, the question here is whether the Act applies at all to a strike or controversy arising out of the organization of the crew of a foreign flag vessel, owned and controlled by foreign nationals and manned by a foreign crew recruited abroad and serving under foreign articles executed abroad. * * * But courts, neither state nor federal, need step aside to permit the National Labor Relations Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern.

The subsequent decision in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co., supra,* may require some qualification of the foregoing language, but it does not limit the essential principle. In the *Interlake Steamship* case the Court held that under *Garmon* a State court has no jurisdiction to determine whether particular employee groups, which are arguably "labor organizations" and hence subject to the Act, are in fact within the statute; the rationale there was "no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act to substantive conduct" (370

U.S. at 178). And since the application of terms such as "employer," "employee" and "labor organization" often involve the appraisal of particular facts and the application of general statutory definitions, the Board has indeed been given wide scope to apply its expertise to these problems, *e.g., National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111. But the instant case is of a different and narrowly special type. The Board has no special competence in determining the jurisdiction asserted by the United States over the ships and nationals of foreign nations, nor is there reason to suppose that Congress intended to place this delicate question affecting defense and foreign relations primarily in the hands of an administrative agency which has no special competence in the area.

Indeed, Mr. Justice Douglas' dissent in the *Benz* case (353 U.S. 147–150) rested on the ground that the labor dispute there was within the exclusive jurisdiction of the Board. The majority opinion in *Benz*, by undertaking to decide whether the Act applied, necessarily held that, if the Act does not cover a particular category of commerce, there is no occasion for the State courts to let the Board decide that issue in the first instance.

3. Under such circumstances to disregard the registry of these Honduran and Liberian vessels "does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign na-

tions" (*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384). In effect, the Board would give the Act coverage, applying it in the one case to Honduran employees of an Honduran corporation on board a vessel engaged in Honduran commerce, and in the other to Italian employees of Italian interests on board a vessel engaged in foreign commerce. The application of the Act on board such ships would not, and could not, be limited to events taking place within the territorial waters of the United States. Any collective bargaining agreement entered into as a result of Labor Board proceedings would necessarily also govern labor-management relations while the vessels are on the high seas and under the jurisdiction of the flag nation, while they are in foreign ports, and even while the Honduran and Italian seamen are in their home ports in Honduras and Italy. To read the Act as covering these employment relations would violate the Court's admonition in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 286—

> An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.

CONCLUSION

The judgment of the New York Court of Appeals in No. 33 should be reversed. The judgment of the Court of Appeals for the Second Circuit in Nos. 91 and 93, and of the District Court in No. 107, should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

1. The Questions Presented Are Correctly Stated in Petitioner's Brief, pp. 2-3.

Respondents contend that the Questions Presented in petitioner's brief are incorrect in two respects:

First, respondents assert that it is not true that petitioner's two vessels come "temporarily into American waters" (Resp. Br., 1, 2). But these vessels do just that. Just like any foreign vessel trading with the United States, they come into American waters for a short period of time to pick up and discharge passengers and cargo. The QUEEN MARY, for example, does precisely that, no matter how regular and continuous may be its participation in foreign commerce with the United States.

Second, respondents also assert that it is not true that the facts are not in dispute (Resp. Br., 2). But there is no dispute as to any fact relevant to the questions here presented, even under the view taken by the United States in its brief as *amicus curiae*. No fact as to foreign registry, foreign flag, foreign ownership, foreign crews serving under foreign articles entered abroad, foreign home port, foreign refitting and repair is challenged by respondents and all are correctly stated in petitioner's brief. Respondents' assertions with respect to the relationship of Incres and the Agency, which are dealt with in point V below, we do not believe to be material.

II. Disregard of the Law of the Flag Would Breed Uncertainty in the Administration of the Internal Order of Foreign Vessels and Invite Conflict Among Nations, As Is Evidenced by the Briefs Filed by Governments as *Amici Curiae*.

Petitioner, of course, welcomes the support of the brief of the United States (hereinafter cited as U. S. Br.) as it does that of the briefs of the governments of the Republic of Liberia (hereinafter cited as Lib. Br.), the Republic of Panama (hereinafter cited as Pan. Br.), the United Kingdom of Great Britain and Northern Ireland (hereinafter cited as U. K. Br.), and those of Canada (hereinafter cited as Can. Br.) and the Republic of Honduras (hereinafter cited as Hon. Br.) in briefs filed in cases Nos. 91, 93 and 107.

We find in these briefs legal arguments that we believe to be decisive of the questions here presented. We refer to the arguments that only one nation can effectively regulate the problems of union organization and collective bar-

gaining with respect to a vessel operating in international trade (U. S. Br., 32-37); that, as in the decision of this court in *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), the Act should be construed to recognize the need for comity and reciprocity in relation to international maritime commerce and for avoiding conflict with international usage (U. S. Br., 37-46; U. K. Br., 6-7; Lib. Br., 6-7; Pan. Br., 7-8; Can. Br., 14-18; Hon. Br., 9-10); that this comity and reciprocity in international maritime commerce require honoring the traditional maritime principle that the law of the flag nation governs the internal affairs of a vessel (U. S. Br., 41-45; U. K. Br., 4-7; Lib. Br., 7-15, 17; Pan. Br., 9-13; Can. Br., 11-14; Hon. Br., 10-14); and that the assertion of NLRB jurisdiction over these vessels, in disregard of the established principles of international law, would disturb international relations with friendly maritime nations (U. S. Br., 47-50; U. K. Br., 1-2, 4; Lib. Br., 6, 7, 10; Pan. Br., 6, 8, 19; Can. Br., 18-26; Hon. Br., 6-7, 14, 17).

We submit that the propositions of law, stated in these briefs, all of which are urged by us in our Main Brief, 22-27, 38-47, are in accord with controlling decisions of this Court, are decisive of the questions here presented and call for reaffirmance of the long standing rule of flag law under which international commerce by water has grown and been conducted. All nations have long relied on this rule of law. Ships under the flags of all nations have come to our great seaports in reliance upon the respect that will be accorded to the flag and to the integrity of the internal order of these ships.

We cannot accept the suggestion of the United States that the two ships of the Ineres Line are registered under "true flags of convenience" (U. S. Br., 5, 54). We know of no reason why owners of one nation may not invest in ships to be operated under the flag of another nation. It has long been common practice in the maritime world. The expression used, whatever usefulness it may have in other contexts, has no legal significance and scarcely advances analysis of the legal questions here presented.

We know of no legal significance to the point made by the United States that the Ineres Line ships are neither engaged in the commerce of Liberia, the flag country, nor have any operational contacts with it (U. S. Br., 54). The United States cites no authority in support of the legal significance of this point. In terms of the facts of international maritime commerce, the point is mischievous and, if accepted and given legal significance, would, we submit, introduce discord and constant controversy between maritime nations, new and old. It is common knowledge that ships which fly one nation's flag frequently are put to use in trade between other nations. In the brief filed herein by the United Kingdom (U. K. Br., 5) it is pointed out that Norway, with a population of about three and a half million, contributes about twelve million gross tons of shipping to the carriage of cargoes in international trade. Many of the ships of such a nation operate seldom, if at all, in the trade of the flag country. Many of such vessels rarely, if ever, see their home ports.

The principle that the law of the flag nation governs the internal affairs of a vessel (U. S. Br., 41-45) has no qualification, such as seems to be suggested by the United States.

The legal status of a ship is surely not to be dependent upon the particular trade it is serving on any given voyage or perhaps on the origin or destination of the cargo it is carrying at any given time.

III. Respondents' Assertion That Application of the Labor Act to Incres Vessels Will Not Detract From Their Liberian Nationality or Interfere in Their Internal Order Is Wholly Erroneous in Fact and Law.

It is astounding to read in respondents' brief, 46-51, that application of the Labor Act would not detract from the vessels' Liberian nationality or interfere in their internal order.

Respondents say that the Act does not compel the inclusion of any specific terms in a bargaining agreement, but merely encourages private collective bargaining which they urge, is no interference in the internal order of a ship (Resp. Br., 50-51). Respondents forget that collective bargaining is itself an important part of the internal order of a ship.*

Their argument here is a transparent *non sequitur*. Even a cursory look at the Act reveals that it regulates almost every conceivable aspect of labor relations other than the actual rates of pay and working conditions agreed upon.** It regulates these matters at all times and in all

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* The charge filed with the NLRB by respondent IMWU against petitioner on May 13, 1960 charged a violation of Section 8(a)(5) by refusal to recognize and bargain in good faith with the union (Def. Ex. A, R. 27). The charge has been on file for over two and one half years without any action by the Office of the General Counsel.

** For example, if a captain were to dismiss a crew member and a charge were filed with the NLRB that the dismissal was for union

(Continued on page 6)

places, wherever the ship may be. Without more, the very nature of the Act renders it inapplicable to any foreign flag vessel. For example, the basic and essential discipline on shipboard would be directly affected by this Act, if it is held to be applicable to these ships, because even the possibility that the master may have to defend his disciplinary acts against attack under United States law is itself an interference with shipboard discipline.*

(Continued from page 5)

activity and constituted a violation of Section 8(a)(3), the NLRB would rule on the validity of discharge. Section 10(c) empowers the Board to order the crew member reinstated to his former rank with back pay.

In fact, Sections 7, 8, and 9 of the Act govern the rights and conduct of employers and employees in all aspects of labor relations, including representation questions and limitation of employers in influencing employees on such questions or in intervening in union affairs as well as employees' rights with respect to strikes, picketing and other coercive measures and to compel collective bargaining. Section 9(b) empowers the Board to determine the appropriate bargaining unit.

The fact that the Act governs the rights of employees to strike, picket, or otherwise interrupt shipboard operations and that it compels an employer to bargain solely with an NLRB certified union may be the most dramatic examples of interference in a ship's internal order.

Section 9(c) governs when a union may seek certification and Sections 8 and 9 govern the validity and effect of bargaining contracts. For example, Sections 8(a)(1) and 8(a)(2) make validity dependent on circumstances under which the collective bargaining contract was executed, and Section 9 and connected administrative rules regulate the effect of a contract as a bar to an election petition and its effect under Section 8(b)(7)(A) as a bar to recognitional and organizational picketing.

The Act prohibits the inclusion of specific provisions in bargaining contracts, for example, Section 8(e) prohibits "hot cargo" clauses and Section 8(a)(3) certain union security clauses.

* The views of counsel for respondents are shown in a question asked of the Captain of the NASSAU. He was asked whether he knew that "the Union can challenge the Captain's right to fire a person" (R. 155). Objection to this question was sustained (*ibid.*).

The laws of Liberia, the flag country, are comprehensive in the regulation of the ship itself.* It has a growing body of law on wages and hours, repatriation and care of sick or injured seamen and unionization.** These laws reflect the policies of the Republic of Liberia and if they differ from those of the United States, so do the laws of other maritime nations. They are due the respect and recognition that is accorded the laws of any other nation.

It is equally astounding to read that the internal order doctrine is inapplicable because here industrial strife involving foreign seamen "spilled over from the vessels onto the docks" (Resp. Br., 49-50). So far as the facts are concerned, respondents seem to be saying that if they interfere hard enough and successfully with the internal order so that the crew members walk off the ship and spill onto the dock, then the union conduct has ceased to be an interference with the internal order and has become something else!

On the law, there is no such limitation to the doctrine. *Wildenhus's Case*, 120 U. S. 1 (1887), cited by respondents (Resp. Br., 49), applies the internationally accepted principle that where shipboard crimes affect the peace of the port no principle of comity or international law forbids the coastal state from suppressing the crime and punishing the criminal. The fact that respondents themselves urged the crew members of the NASSAU to desert their ship in violation of their seamen's articles and were the cause of the fact that the controversy "spilled over from the vessels onto the docks" (R. 14, 177-180, 183) (actually the VICTORIA was at all times anchored offshore and her crew, though they de-

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* See Lib. Br., 7 and Appendix A, 19.

** Lib. Br., 7.

serted their duties in violation of their articles, remained on board) illustrates the error in respondents' argument. For their argument, if followed to its logical conclusion, is that the Labor Act is applicable any time respondents involve themselves in the labor relations of a foreign ship. The question here is whether or not the Labor Act governs the labor relations of Incres ships. It is not relevant to this question that the crew of one of them deserted their ship in response to pressures of respondents.

The scope of internal order as a matter of law and its coverage of relations between master and crew is stated in our Main Brief, 42-47. See also the recent study, Boczek, *Flags of Convenience: An International Legal Study*, Harvard University Press, 1962, pp. 172-74, and *Simpson* v. *Hamburg-American Line*, 1939 Am. Mar. Cas. 1469, 1480 (D. Canal Zone, 1939).

IV. Respondents Are in Error As to the Applicable Rules of Statutory Construction.

A. *Congress Has Expressed No Intent to Apply the Labor Act to Foreign Flag Vessels.*

Respondents seek to put aside the territorial canon of construction urged by petitioner as having no place because Congress has expressed its intent in the language of the Act itself (Resp. Br., 35).

We deem this argument to be frivolous in view of the decision of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 142 (1957) in which determination of Congressional intent was deemed to be necessary to determine the scope of the Act.

Respondents attempt to distinguish the *Benz* case urging "the critical significance in the *Benz* holding of the

transient or temporary connection with American commerce" (Resp. Br., 27). This distinction is exposed by respondents themselves. They admit that the Labor Act would "undoubtedly" and "unquestionably" be inapplicable to a vessel such as the QUEEN MARY "even though the vessel regularly calls at American ports" (Resp. Br., 22-23). Thus, in spite of their four-page argument that the *Benz* case hinged on the vessel's temporary or transient connection with American commerce, respondents have to admit that a case in which a vessel is regularly and frequently in American commerce would be decided the same way as the *Benz* case.

B. *The Territorial Canon of Construction Has Been Consistently Applied to American Labor Legislation, As We Show in Our Main Brief.*

Respondents seek to meet the force of the argument on pp. 25-26 of our Main Brief by contending that our citation of two air line cases was erroneous (Resp. Br., 36).

In the two cases cited by us the Railway Labor Act was sought to be applied to air line employees. The decisions in both cases found that Act lacking in explicitness with respect to the scope of its application to air line employees. Both decisions were based on and employed the territorial canon of construction that "explicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially," as stated in *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685, 690-691 (D. C. Cir.), *cert. denied*, 342 U. S. 849 (1951) and "unless there is an explicit and unequivocal showing o[illegible] contrary intent. Acts of Congress are to be given an interpretation which is domestic in nature" as stated in *Air Line Stew-*

ards, Etc., Ass'n v. Northwest Airlines, Inc., 267 F. 2d 170, 178 (8th Cir.), *cert. denied*, 361 U. S. 901 (1959). In both cases the courts cited the territorial canon as stated in *Foley Bros. v. Filardo*, 336 U. S. 281 (1949). The two circuit courts specifically ruled that the interwoven structure of the Act and the amendments respecting air transportation did not supply such explicitness.

C. *When Congress Has Legislated With Respect to Foreign Vessels Its Intention to Do So Has Been Clearly Expressed.*

Again, respondents seek to meet the force of the argument on pp. 27-29 of our Main Brief as to Congressional practice in legislating as to foreign flag vessels by pointing to the Jones Act* and three sections of the Merchant Seamen's Acts which we had not noted. None of the sections which we did note are controverted.

Respondents are correct in stating that in none of these three sections is there explicit application of the provisions to foreign flag vessels but the sections cited by respondents, 46 U. S. C. §§593,** 594,*** 596**** have a similar

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*The Jones Act is discussed in our Main Brief, 37. See also U. S. Br., 53.

** Section 593 provides for payment of earned wages and transportation of seamen to the place of shipment upon loss or wreck of their vessel.

*** Section 594 provides for payment of seamen's wages in certain cases where seamen are discharged in breach of their articles. It does no more than provide a remedy in the court of the forum selected and the measure of damages to be applied to such a breach of articles. See *Zarraga v. Texas Company*, 284 F. 2d 657 (3rd Cir. 1960).

**** Section 596 gives seamen the right to their wages within a stated time after arrival in port.

subject, seamen's wage claims, and a common purpose to assure that seamen do not arrive penniless in a strange port and thereby burden the local community. *Marromatis v. United Greek Shipowners Corporation*, 179 F. 2d 310, 315 (1st Cir. 1949).

This same purpose carries through other contiguous sections of the Seamen's Acts which deal with wages and which apply expressly to foreign seamen.* The likeness of all these contiguous seamen's wage provisions indicates a Congressional purpose that they be read together and the coverage of foreign vessels expressed in some be treated as indicative of a like coverage of the others. The Fourth Circuit did exactly this in *The Sonderborg*, 47 F. 2d 723 (4th Cir.), *cert. denied*, 284 U. S. 618 (1931), cited by respondents at page 40 of their brief to show application of an Act to foreign ships without any expression of Congressional intent. In that case, the court noted at page 726 that "'. ... the statute [46 U. S. C. §596] ought not to be construed [to apply to foreign seamen aboard a foreign ship] unless it plainly appears that this was the intention of the Congress,' ". It found such clear intent to exist because Congress intended that Sections 596 and 597 be read together, *id.* at 727.

Finally, respondents point to the application to a foreign vessel of a domestic statute limiting shipowners' lia-

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* Section 597 (46 U. S. C.) grants seamen on both domestic and foreign vessels the right to receive one-half of their earned but unpaid wages while their vessels are in American waters.

Section 599 (46 U. S. C.) prohibits the payment of advances and certain allotments to seamen on both domestic and foreign vessels. This section protects seamen against many schemes historically employed to defraud seamen of their wages; see generally *The Eclipse*, 53 Fed. 273 (N. D. Cal. 1892).

bility in *The Scotland*, 105 U. S. 24 (1882). The statute as then worded (9 Stat. 635 (1851)) applied to "any vessel." Respondents imply that, by analogy, the general language used in the Labor Act should be construed to apply to foreign seamen aboard foreign vessels. This Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) referred to the decision in *The Scotland* and stated the error in such an analogy:

> "The limitation-of-liability statute was construed to thus apply [to a foreign vessel] only against those who had chosen to sue in our courts on foreign transactions. Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not." *Id.* at 591-592.

D. *The 1959 Amendment to the Labor Act Furnishes No Support to Respondents.*

The contention of respondents is that the 1959 amendment to Section 14(c)(1) of the Act, 29 U. S. C. §164(c)(1), though "directed primarily at filling the no-man's land" in the Act (Resp. Br., 42), "practically requires the Board to assert jurisdiction over foreign flag vessels" in the circumstances urged by respondents (Resp. Br., 41).

This same contention is made by the Board in cases Nos. 91, 93 and 107 (Board Br., 43), and is answered in the brief of the United States (U. S. Br., n. 8, pp. 40-41). We join in the "short answer" of the United States to this contention.

7. Factual and Conclusory Statements of Respondents Are Erroneous and Unsupported.

We have selected the following factual assertions in respondents' brief as warranting correction, though we deem them to be not relevant to the questions presented:

1. Respondents state that "from 39 Broadway Bergeri [president of petitioner] and Wolfson [president of Cheres Line Agency, Inc.] handle or oversee passenger bookings, provisioning, arrangements for arrival and departure, inspections, fueling, advertising, repairs, cargo and other husbandry details" (Resp. Br., 6).

The foregoing ignores Cosmopolitan Shipping Corporation, agent for a number of lines, which acts as ships' husband when the ships are in New York. This includes handling and overseeing fueling, loading, docking and disembarkation of passengers, hiring of linesmen, tugboats and pilots (R. 58, 61, 172, 175).

Respondents seek to lump the petitioner Line with the agency and ignore their separate functions in the orderly conduct of business (see our Main Brief, 4, 9-10).

2. Respondent's point to Wolfson's verification of the complaint and moving affidavit as "a striking demonstration of the unity of interest and relationship" between petitioner Line and the Agency (Resp. Br., 6).

The fact is the opposite. In his affidavit Wolfson stated that the reason he did this was that petitioner, a Liberian corporation, had no office or place of business within the United States and no officer of petitioner was then in the United States (R. 12).

Respondents, still in search of unity between the two, assert that the two corporations are "cemented together

by interlocking officers and directors" (Resp. Br., 7). The plain fact is that only Berlingeri is an officer and director of both corporations (R. 59-60). This is the same record citation used by respondents in support of their assertion of plural interlocking. They lay stress on the fact that a technical inspector employed by Ineres "maintains his desk at 39 Broadway" (Resp. Br., 6), but do not mention that he was present in New York specially to inspect extensive alterations to the VICTORIA made in Rotterdam the year before carrying a one year's guarantee (R. 81).

3. Respondents assert, as if the points had been litigated below and were relevant, "that Ineres seamen belong to no union, are paid substantially less than Italian union scale and have serious differences with Ineres" (Resp. Br., 5). These categorical statements are supported by references to the testimony of the Captain of the NASSAU. So far as he had knowledge of such matters he testified that the Ineres seamen's contract "was approved by the Italian union" (R. 164). Wolfson's affidavit is the same (R. 13) and, in addition, Wolfson stated upon information and belief that at all times since such approval "a large proportion of the crews have been members of that union" (R. 13). The Captain did not contradict this. He testified that "as far as I know" the members of the crew were not represented by a union (R. 163-164). Of course, these points were irrelevant below and are not developed in any detail in the record.

4. Respondents assert that "labor relations matters are similarly dealt with from 39 Broadway" (Resp. Br., 6).

The fact is that the crews are recruited and hired in Genoa (R. 55, 56, 105). The wages, terms and working conditions are agreed to there (R. 56, 118), and the final contract is approved by an Italian union (R. 13, 164). Dis-

ciplinary actions taken are the sole responsibility of the ship's captain (R. 155, 156). Moreover, it is clear that Wolfson had no authority to negotiate with respondents when the interferences started (R. 211). Necessarily when the interferences in New York began, they had to be dealt with by someone in New York rather than the owners in Genoa, but when problems between Ineres and respondents arose at a time when no officer of Ineres was in the country, their resolution had to await the arrival in New York of Berlingeri (R. 211).

5. Respondents assert that the two ships are operated "exclusively in United States commerce" (Resp. Br., 47). Clearly, however, both ships are operated in international commerce, not exclusively in United States commerce. Vessels operating in international commerce are necessarily operating in the foreign commerce of at least two and often more than two countries. See, *e.g.*, *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, 300 F. 2d 222, 224, *cert. granted*, 370 U. S. 915 (1962) and our Main Brief at 36.

Dated: November 27, 1962.

Respectfully submitted,

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SUPREME COURT, U. S. **No. 33.**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SUPPLEMENTAL STATEMENT OF RESPONDENTS CORRECTING AN ERROR

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SUPPLEMENTAL STATEMENT OF RESPONDENTS CORRECTING AN ERROR.

On page 52 of our main brief we cited and discussed a number of provisions of Title 22 of the Liberian Code of Laws of 1956[1] (i.e., §§312, 313, 314, 315, 316). These sections, as we pointed out, were limited in their application to events taking place in Liberia or to vessels in Liberian waters. They were all subsequently repealed or removed from Title 22 and placed in Title 19 of the Code and assigned new section numbers. So far our discussion of the Liberian Code was correct.

[1] Published by the Cornell University Press.

We were unaware at the time but have since been informed by counsel for the Republic of Liberia that after repealing or removing the old provisions of Title 22, new provisions were enacted by the Republic of Liberia dealing with different subject matter but assigned the old section numbers. At the same time, a new Section 369, which we referred to as non-existent, was added to Title 22. These provisions appear to have been published for the first time on an unspecified date after Februery 4, 1961. They were not published by the Cornell University Press, although so cited in the Republic of Liberia's brief, and that is why we overlooked them. These new sections set minimum standards governing such things as maintenance and cure, burial expenses, repatriation, overtime wages, and age of seamen employed on Liberian flag ships. Application of the LMRA to Liberian flag ships operated in United States commerce would in no way interfere with enforcement of these laws by the Government of Liberia. Indeed, new Section 369 recognizes the right of seamen on Liberian flag ships to bargain collectively regarding terms of employment. It provides:

> "Additional Agreement.—Notwithstanding anything in this Chapter, nothing shall prevent a shipowner or employer from entering into agreements with employees covered by the provisions of this Chapter, as a consequence of collective bargaining or otherwise, embodying standards not lower than those required by this Chapter."

We apologize for any mistaken impressions caused others by our own confusion.

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